UNITED NATIONS
General Assembly
FORTY-FIFTH SESSION
Official Records

SIXTH COMMITTEE
26th meeting
held on
Wednesday, 31 October 1990
at 3 p.m.
New York

SUMMARY RECORD OF THE 26th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

CONTENTS

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued)

This record is subject to correction.
Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, Room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/45/SR.26
7 November 1990

ORIGINAL: ENGLISH

/...

best copy available

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (A/45/10 and A/45/469) (*continued*)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (A/45/437) (*continued*)

1. *Mrs. BELLAMINE-DLIMI* (Tunisia), referring to chapter III of the report of the International Law Commission (A/45/10) concerning jurisdictional immunities of States and their property, said that the growth of co-operation between States and the ever-greater number of international transactions made it increasingly necessary to establish guidelines in that area. That was not an easy task, however, because it impinged on the sovereignty and interests of States, and views diverged as to the extent of that sovereignty. The Commission should take into account the practice and relevant legislation of all States and develop compromise solutions which could serve the collective interests of the international community. A balance must be struck between two categories of interests, namely, those of the foreign State which wished to enjoy the broadest possible jurisdictional protection in other States, and those of the State in whose territory the question of immunity arose and which wished to ensure its overall jurisdiction.

2. With regard to limitations on or exceptions to State immunity, as discussed in paragraphs 172-174 of the report, she felt that a title such as "Activities of States in respect of which States agree not to invoke immunity" for part III would more clearly reflect the idea that the jurisdictional immunity of States and their property was the rule in international law and that exceptions to that rule should be subject to the express consent of States.

3. Commenting on specific draft articles, she said that article 12, relating to contracts of employment, was extremely important, as national courts were in practice the only bodies which could provide effective recourse for some categories of employees of a foreign State. In that connection, the scope of the exceptions to the rule of non-immunity should be narrower, since, as set out in the draft article, they threatened to render nugatory the principle of non-immunity. The category of persons covered by subparagraph (a) of paragraph 2 of the draft article was too broad and made the rule of non-immunity established under paragraph 1 inapplicable in respect of all employees who had been recruited to perform services associated with the exercise of governmental authority. Accordingly, she shared the view of the Special Rapporteur as set out in paragraph 177.

4. She felt that article 13 relating to the liability of a State to pay monetary compensation for the damage caused by an act or omission attributable to that State should be retained, since without such an exception to jurisdictional immunities of States, an injured individual would be virtually without recourse.

/...

(Mrs. Bellamine-Dlimi, Tunisia)

5. With regard to State-owned ships engaged in commercial service as referred to in article 18, there was no unanimity concerning the use of the word "non-governmental" in paragraphs 1 and 4. While she had no objection to the deletion of that word, it should be made clear that, in cases where the public interest was involved in a commercial activity carried out by a State ship, the State concerned could invoke the immunity of the ship.

6. Turning to article 19, relating to the effect of an arbitration agreement, she felt that the scope of arbitration could be extended to a civil matter, first, because there had already been precedents in that area, and secondly, because the scope of arbitration depended primarily on the terms of the arbitration agreement. Accordingly, she saw no reason to limit the supervisory jurisdiction of a court of a forum State to commercial contracts. Moreover, a provision should be included stating that submission to arbitration should not be construed as submission to the jurisdiction of the forum State.

7. In her view, article 20, relating to cases of nationalization, should be deleted, because measures of nationalization, as sovereign acts, could not be considered as representing an exception to the principle of State immunity.

8. With regard to the draft articles in part IV, relating to State immunities in respect of property from measures of constraint, there was still a division of opinion. Her view coincided with that of the Special Rapporteur as set out in paragraphs 218-220 of the report. With regard to new article 21 as submitted by the Special Rapporteur, she felt that the words "[and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed]" in subparagraph (c) of paragraph 1 should be retained, because if they were deleted, measures of constraint could be taken against any property of a foreign State which was used for commercial purposes. Likewise, she favoured the deletion of the phrase "[, or property in which it has a legally protected interest,]" in the preambular paragraph of article 21 and paragraph 1 of article 22 as provisionally adopted on first reading, because it was necessary to focus on property of a foreign State as the sole object deserving protection. She could not endorse the idea of granting to third parties protection from measures of constraint simply because a foreign State had an interest in the property concerned. In that connection, the draft of the 1983 Convention on Succession of States in respect of State Property, Archives and Debts, in which the concept of "interest" had been distinguished from that of "property", should be borne in mind.

9. Sir Arthur WATTS (United Kingdom) welcomed the progress made by the Commission on a significant number of draft articles dealing with jurisdictional immunities of States and their property. However, there still appeared to be divided views in the Commission on the underlying doctrinal and legal bases for the topic. In his view, international law had developed in such a way that the old rule of absolute immunity had become obsolete. A substantial body of State practice, as well as a number of developments in international law, supported the principle that those who found themselves involved in a dispute with the Government of a foreign State,

/...

(Sir Arthur Watts, United Kingdom)

acting in a non-sovereign capacity, should be able to have that dispute determined by the ordinary processes of law.

10. He attached particular importance to three points. The first concerned the question of whether or not a transaction was a "commercial transaction"; he noted that the newly-combined article 2 still referred to the "purpose" of a transaction in determining the answer to that question. He reiterated his previously expressed view that factors such as purpose should not be introduced into the definition.

11. Secondly, with regard to the concept of segregated State property, which was the subject of articles 11 bis and 23, he agreed with those members of the Commission who considered that the concept required further clarification. Indeed, he remained to be convinced that it was necessary to have a provision on that subject at all and believed that the Commission should give further thought to the matter.

12. As to the rules on immunity of States from measures of constraint, which was the subject of articles 21 and 22, his delegation shared the view of those States which favoured limiting such immunity, and could not support the granting of absolute immunity from such measures. As the Special Rapporteur had pointed out, the recent tendency in State practice had been to restrict State immunity in that respect.

13. Turning to the topic of the non-navigational uses of international watercourses, he welcomed the Commission's contribution to an aspect of international environmental law which was one of the central issues of the time. As in previous years, his delegation supported the "framework" approach of the draft articles, but it had yet to be convinced that the results of the Commission's work should take the form of binding rules in a convention. It might be more appropriate, and more likely to meet with general acceptance, if the rules were embodied in a set of recommendations or guidelines.

14. His delegation had noted the critical remarks made in the Commission at its most recent session concerning the inclusion in proposed annex I of a provision on the status of international watercourses and water installations in time of armed conflict. Dealing as it were incidentally with an aspect of the law of armed conflict in the context of the quite different subject of the régime of international watercourses might not be the best way to tackle that important question.

15. Article 3, paragraph 2, of annex I sought to impose a duty to co-operate in the implementation of existing international law. While such international co-operation was desirable, he wondered whether such a provision in a legal text added anything useful to existing obligations, and whether it was realistic to establish an open-ended obligation to co-operate. Paragraph 2 adopted a cautious approach to the development of specific procedures for payment of compensation, such as compulsory insurance or compensation funds. Given the considerable resources needed for the establishment of such schemes, his delegation endorsed

/...

(Sir Arthur Watts, United Kingdom)

that cautious approach. On balance, it felt that it might be better to omit the whole of paragraph 2.

16. His delegation welcomed the thrust of article 4, which required equal rights of access, and supported the non-discrimination principle reflected in article 5.

17. Mr. ROBINSON (Jamaica), referring to chapter III of the Commission's report, said it was not surprising that the topic "Jurisdictional immunities of States and their property" generated seemingly irreconcilable views because it impinged on the most fundamental issue in international law, namely, sovereignty. The jurisdictional immunity which States and their property enjoyed in the courts of another State derived from the principle of sovereignty; differences existed, however, as to the emanations of sovereign and governmental authority to which jurisdictional immunity should apply. Nevertheless, he remained optimistic that the Commission would produce a set of draft articles leading to the adoption of an international convention on the topic.

18. With regard to article 12, concerning contracts of employment, it could be argued that, as originally drafted, the exceptions in paragraph 2 of that article were so extensive as to render nugatory the non-immunity principle in paragraph 1. However, if the article was to be retained, the exceptions in paragraph 2 should be kept to a minimum. He agreed, therefore, that because subparagraph (a) of paragraph 2 could be interpreted to cover almost all contracts of employment by a foreign State, an effort should be made to reformulate it so that it did not nullify the principle of non-immunity in paragraph 1. In that connection, the Special Rapporteur's proposal, as set out in paragraph 177 of the report, should be considered.

19. With regard to article 13, dealing with personal injuries and damage to property, he had difficulty understanding the concern expressed in paragraph 188 of the report that an unlawful act or omission of a State should be determined through international procedures and not by national courts. As national courts frequently made determinations in accordance with international law, the idea that international law could be applied only by so-called international procedures was not only outmoded, but was flatly contradicted by the practice of many States.

20. On the other hand, he was concerned at the possible lack of consistency between article 13 and the Vienna Convention on Diplomatic Relations; obviously, the article would not be acceptable if it gave States a narrower immunity than was conferred by article 31 of that Convention. Article 31 provided that a diplomatic agent should enjoy immunity from the civil and administrative jurisdiction of the receiving State except in three cases. Since the immunity of the relevant State could not be less than that of its agents, it could be argued that in so far as article 13 deprived that State of immunity in respect of such acts, it was inconsistent with article 31.

READEX FICHE

(Mr. Robinson, Jamaica)

21. As to articles 21 to 23, he supported a formulation of those articles which set out clearly the principle of immunity from measures of constraint, followed by limited exceptions. For instance, he agreed with the provision in subparagraph (a) of article 21 as provisionally adopted by the Commission. He also believed that the phrase "and used for monetary purposes" at the end of subparagraph (c) of paragraph 1 of article 22 as submitted by the Special Rapporteur should be deleted, because property of the central bank of a foreign State in the territory of the forum State should in all circumstances be exempted from measures of constraint regardless of the purpose for which it was used.

22. Article 24, dealing with service of process, placed too much emphasis on the Ministry of Foreign Affairs, and attached to that Ministry an importance not warranted in judicial and litigation matters as distinct from matters relating to international affairs.

23. Turning to chapter IV of the report, concerning the law of the non-navigational uses of international watercourses, he said that the main problem relating to the draft articles considered by the Commission at its previous session derived from their nature as a framework agreement. Two issues arose in that connection, one relating to policy and the other relating to law. First, it might be argued that the formulation of detailed provisions seeking to apply the general principles in the agreement was best left for the watercourse agreements contemplated in article 4 for adoption by watercourse States. However, he believed that there was justification for the inclusion of such provisions, subject to their clarification and amendment.

24. Second, a legal question might arise as to the harmonization of those detailed and specific provisions with the general principles in articles 6, 8, 9 and 10. For example, the obligation under article 22 for watercourse States individually or jointly to protect and preserve the ecosystems of an international watercourse was stated in the commentary to be a specific application of (a) the requirement in article 6 that watercourse States were to use and develop an international watercourse system in a manner consistent with its adequate protection, (b) the obligation under article 6 for watercourse States to participate in the protection of an international watercourse in an equitable manner, which included the duty to co-operate in its protection and development, and (c) the obligation under article 9 for watercourse States to co-operate in order to attain adequate protection of an international watercourse. But could those obligations under articles 6 and 9 be introduced into the régime of article 22 without any language to indicate the relationship between the two sets of articles? Could it be argued that a watercourse State was in breach of its obligation under article 22 because it failed to participate in the protection of the watercourse in an equitable manner? It might be necessary to specify the interconnection between the two sets of articles by inserting in article 22 language such as "without prejudice to articles 6, 8, 9 and 10", to indicate the applicability to article 22 of the general principles set forth in those articles.

/...

(Mr. Robinson, Jamaica)

25. Another illustration was article 23, paragagraph 2, which provided that watercourse States should, inter alia, harmonize their policies in the prevention, reduction and control of pollution of an international watercourse. The commentary stated in paragraph 7 that the provision was a specific application of certain of the general obligations contained in articles 6 and 9, particularly the obligation under article 9 to co-operate in order to attain adequate protection of an international watercourse. Co-operation under article 9 was, however, based on sovereign equality, territorial integrity and mutual benefit. Could a watercourse State argue that it was relieved of the obligation under article 23, paragraph 2, to harmonize its policies on reducing pollution with other watercourse States on the ground that the principles of sovereign equality and mutual benefit had been breached? If the commentary was a proper interpretation of article 23 and many of the other articles dealt with in the report, some way would have to be found to link the obligations under the general principles of articles 6, 8, 9 and 10 with those articles which were intended to reflect a specific application of those principles.

26. The Special Rapporteur was to be congratulated on his boldness in proposing article 26 on joint institutional management, which was an example of the detailing, refining and particularization of the general obligation under article 9 to co-operate. Some might consider it an overrefining which was beyond the scope of a framework agreement and would more properly belong to a watercourse agreement. His delegation believed, however, that international watercourses were so vital to the survival of large sections of the world's population that their management on an agreed international basis on the lines envisaged in article 26 was an irresistible imperative of modern life. The Special Rapporteur and the Commission deserved to be commended for the brave steps being taken in the progressive development of international law in the new area of the law of interdependence and co-operation, of which the establishment of normative requirements for consultation, negotiation and co-operation among States was an integral part. His delegation did not, however, think it appropriate to design the consultative process set up in article 26 in such a way as to make it capable of being activated by the request of one State. It also felt that it would be preferable to provide a general description of the functions involved in the management of an international watercourse by a joint organization than to list such functions, even in a non-exhaustive manner. So long as there was a list, however, his delegation supported the inclusion of functions which were of particular importance to developing countries.

27. The purpose of annex I was not clear. If it was to oblige watercourse States to provide a régime of civil liability in their domestic legal systems for the benefit of aggrieved individuals in other watercourse States, such provisions should surely form part of the body of the draft articles and not be placed in an annex. Moreover, the provisions on non-discrimination, recourse under domestic law and equal right of access needed to be reformulated in simpler and clearer terms; it was difficult, in particular, to understand the language of article 2. Articles 6, 7 and 8 should be omitted, articles 7 and 8 being relevant to the draft articles as a whole.

/...

(Mr. Robinson, Jamaica)

28. The strict obligation imposed on watercourse States under article 22 to protect and preserve the ecosystems of international watercourses paralleled the equally strict obligation imposed on States by article 192 of the United Nations Convention on the Law of the Sea to protect and preserve the marine environment; however, the term "ecosystem" was narrower in scope than the term "marine environment". While it was true, as stated in paragraph (4) of the commentary, that the expression "prevent, reduce and control pollution" employed in article 23, paragraph 2, was also to be found in article 194, paragraph 1, of the United Nations Convention on the Law of the Sea, the obligation imposed by the latter instrument was less strict than that proposed under article 23. The basic obligation under article 194, paragraph 1, was hardly different from that imposed on watercourse States under article 24 of the present draft, in respect of which paragraph (3) of the commentary stated that it was one of due diligence and would not be regarded as having being breached if a watercourse State had done all that could reasonably be expected to prevent the introduction of the species referred to in the article. Both the obligation under article 194, paragraph 1, of the United Nations Convention on the Law of the Sea and that under article 24 of the draft under consideration were obligations of due diligence; why, then, was the obligation under article 23, paragraph 2, not also couched in the language of due diligence? Was the departure from that language deliberate, and was it the intention to impose a strict obligation on the watercourse States in the matter? Perhaps it had been felt that the greater fragility of international watercourse systems warranted the distinction.

29. Lastly, commenting on article 25, he noted that the expression "take all measures ... necessary" had the same meaning as in article 24; the obligation was, therefore, not strict but was one of due diligence. But was the obligation of due diligence imposed on watercourse States to protect the marine environment consistent with the strict obligation imposed by article 192 of the United Nations Convention on the Law of the Sea on States to protect and preserve the marine environment? His delegation doubted whether it was correct to reduce what was a strict obligation in that instrument to one of due diligence in the present draft articles.

30. Mr. ALZATE (Colombia) said that his country attached great importance to the topic "The law of the non-navigational uses of international watercourses". Colombia was keenly aware of the need to protect and preserve river basins and watercourse systems in order to ensure their optimum utilization and, where they were of an international nature, to guarantee that neighbouring countries had access to them on an equitable basis.

31. In a broader context than that of the topic dealt with by the Commission, he wished to describe Colombia's positive experience gained from the establishment of commissions with Venezuela and Ecuador. In both cases the purpose of the commissions was to consider issues of joint interest, including co-ordination and the promotion of programmes, projects and agreements to improve living conditions and social and economic development in the border areas. Colombia had, for example, concluded a number of agreements with Venezuela dealing with: the study

(Mr. Alzate, Colombia)

and development of the Carraipía-Paraguachón rivers; the re-establishment and method of operation of the joint team for the Orinoco river; and the Orinoco hydroelectric project. In the case of Ecuador, bilateral machinery had been set up in order to promote the integration and development of Ecuador and Colombia. One subject to be dealt with by such machinery was plans for the management of shared river basins. For example, an agreement had been concluded on the management of the Mira and Mataje rivers and another on pollution control in the Carchi-Guaitara river basin.

32. With regard to the draft articles on the law of the non-navigational uses of international watercourses, his delegation saw the draft as a framework instrument laying down rules of international law that would be subject to approval and development by the countries concerned. The draft should cover all non-navigational uses, and should not cover navigational uses at all. That meant that article 24 as proposed by the Special Rapporteur dealt with a matter that fell outside the scope of the text, namely the absence of priority among uses. That was an issue that could be dealt with in other types of instruments. Furthermore, the concept of priorities should not be regarded as an abstract principle not involving specific factors. The concept must be based on the existence of real elements, such as the benefits to be derived by populations that depended either directly or indirectly on the watercourse in question. If priority was not assigned to various different types of uses, it would not be possible for given groups of people who were usufructuaries to benefit from the watercourse. There must therefore be a direct relationship between the concept of assigning priority and the concept of the benefit to be derived.

33. With regard to article 25 as proposed by the Special Rapporteur, his delegation agreed with the views expressed in paragraph 269 of the Commission's report. An instrument such as the one under discussion should take a flexible approach to the issue of co-operation so as to ensure that there were no constraints on initiatives concerning the construction and maintenance of works of concern to one State.

34. Article 26 as proposed by the Special Rapporteur, on joint institutional management, contained some new concepts that fell outside the purview of a framework instrument. Any decisions on the subject in question should be taken by the States concerned at the appropriate time. Colombia therefore believed that the draft should not deal with the matter in detail, and that States should consider either individually or jointly ways of improving the management of watercourses. It should be borne in mind that such management activities were very specialized and therefore did not necessarily fall within the category of general administrative matters.

35. Article 27 as proposed by the Special Rapporteur laid down rules governing the protection of water resources and installations. Colombia endorsed the principle of such protection provided that States' obligations and rights were properly balanced. The construction of works must not constitute a threat to States downstream. Works and related installations must be protected since they could be a potential risk in certain cases.

/...

(Mr. Alzate, Colombia)

36. With regard to article 28 as proposed by the Special Rapporteur, Colombia welcomed the interest shown in accepting the principle that international watercourses and related installations should be used exclusively for peaceful purposes, provided that the principles of protection and preservation of resources were regarded as being included. However, it was perplexing that such a rule, and in particular the words "in time of armed conflict", should be included in an instrument based on the principle of co-operation.

37. He now wished to comment on the draft articles in annex I as proposed by the Special Rapporteur. Although the text of article 1 might be appropriate from a purely legal point of view, it was inappropriate from a geographical and biological point of view. It would therefore be appropriate to consider a definition that did not necessarily depend on the concept of either real or potential appreciable harm.

38. His delegation attached particular importance to articles 2 to 4 of annex I. Account must be taken of constitutional issues permitting the relevant States to develop those provisions. Colombia would be interested to see the corresponding definition laid down in the draft on international liability for injurious consequences arising out of acts not prohibited by international law. In the meanwhile, in any event, Colombia believed that States could reserve the right to waive immunity from the execution of judgements. It was therefore of the view that article 6 of annex I went too far. Once that part of the annex had been revised, it should be included as an optional annex. The Commission should give careful consideration to whether or not the provisions in question should be included in the draft.

39. Lastly, his delegation wished to request that at the end of the Commission's forty-third session the report on the session should be transmitted to Governments as soon as possible.

40. Mr. ORDZHONIKIDZE (Union of Soviet Socialist Republics), referring to chapter III of the report, noted that progress had been achieved by the Commission in its work on the topic "Jurisdictional immunities of States and their property". With regard to article 11 *bis*, work on which was not yet completed, he said that the concept of segregated State property had achieved wide recognition in a number of countries and was also reflected in certain international instruments, in particular in article 2 of the 1978 Protocol amending the Rome Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface, article 1 of the 1969 International Convention on Civil Liability for Oil Pollution Damage and articles 1 and 2 of the 1973 Convention relating to the Limitation of Liability of Owners of Inland Navigation Vessels. The essence of the concept was, of course, that a company possessing segregated property could not invoke immunity and that State liability was not engaged in connection with that company's obligations. With regard to article 18, his delegation was in favour of extending the concept of segregated State property to ships owned by companies and shipping lines and used for commercial service. The inclusion in the draft articles of the concept of segregated State property would be of considerable value in promoting close economic relations in the interests of all countries.

(Mr. Ordzhonikidze, USSR)

41. Referring to article 12, relating to contracts of employment, he said that the indifference or animosity which had previously characterized his Government's attitude towards Soviet citizens residing abroad now belonged to the past; provided such individuals retained their citizenship, they were now considered to be Soviet citizens with all the legal consequences which that entailed. His delegation was therefore in favour of deleting the reference to habitual residence in the State of the forum from paragraph 2 (c) of article 12.

42. With regard to article 19, his delegation took the view that the basic assumption should be that a State agreed to submit to arbitration voluntarily through the conclusion of an agreement. He shared the view expressed by Governments and Commission members to the effect that a State party to an arbitration agreement must retain its right to invoke immunity before the courts of a State that was not involved or designated by the agreement, unless the agreement contained an explicit provision to the contrary.

43. In connection with article 20 he said that measures of nationalization, as sovereign acts, were not subject to the jurisdiction of another State and could not be considered to represent an exception to the principle of State immunity. His delegation supported the Special Rapporteur's recommendation to delete the article.

44. New article 21 proposed by the Special Rapporteur on the basis of the merging of the original articles 21 and 22 represented a radical departure from the text of original article 21, which set forth clearly the principle of inadmissibility of measures of constraint. His delegation doubted whether a compromise solution could be found in the absence of clear recognition of the principle itself.

45. The provisions of new article 22 were of fundamental importance; in particular, paragraph 1 (c) of the article was based on the recognition of the fact that central banks were instruments of sovereign power and their activities should consequently enjoy immunity from measures of constraint. The legal status of a central bank should be that of a state organ automatically enjoying immunity.

46. Concluding his remarks on the topic, he drew attention to the far-reaching economic changes currently taking place in the Soviet Union; in particular, he referred to the adoption of a new law on property earlier in the year and to the still more recent adoption by the Supreme Soviet of the USSR of a document dealing with the introduction of a market economy. It should be noted that the latter document established the general principle that each of the Union republics could implement its own programme and also affirmed the recognition of multiple forms of property ownership, including private ownership.

47. Turning to chapter IV of the report, dealing with the topic "The law of the non-navigational uses of international watercourses", he said that the protection and preservation of the environment formed one of the topic's key issues, being of vital importance not only to each individual State but to mankind as a whole. His Government was convinced that the problem of the environment could be resolved only

(Mr. Ordzhonikidze, USSR)

by joint efforts on the part of all States and wished to intensify its co-operation in that field with other countries, inter alia, within the framework of international organizations. His delegation therefore actively supported the idea reflected in the draft articles that States should co-operate with a view to the preservation of water resources and the protection of the safety of hydraulic installations. The object of paragraph 1 of article 24 as proposed by the Special Rapporteur, to the effect that, in the absence of agreement to the contrary, neither navigation nor any other use enjoyed an inherent priority over other uses, was, in his view, to harmonize the joint and individual interests of watercourse States.

48. With regard to articles 26 to 28 as proposed by the Special Rapporteur, his delegation endorsed article 26 on joint institutional management and supported the idea of establishing joint commissions of watercourse States to deal with practical issues. It should be noted, however, that the establishment of joint management of the watercourse as a whole, unlike the management by individual watercourse States of their own parts of the watercourse, would require special agreement in each case.

49. Article 27, on protection of water resources and installations was acceptable as a whole; in particular, he welcomed the inclusion of a reference to water resources, their protection being closely connected with the problem of preventing pollution. His delegation also endorsed the principle set forth in article 28 that international watercourses should be used exclusively for peaceful purposes.

50. With regard to articles 7 and 8 of annex I, he said that the measures proposed, and in particular the convening of a conference of the parties corresponding, in essence, to a fully-fledged international organization, was inconsistent with the framework agreement character of the draft. His delegation had serious doubts as to the appropriateness of including those articles in the draft. In conclusion, referring to the proposed annex II on fact-finding and settlement of disputes, he said that the matter should be determined by the watercourse States themselves in documents agreed between them on the basis of the framework agreement being prepared by the Commission.

51. Mr. VUKAS (Yugoslavia) said that his country had always had the greatest esteem for the Commission's work and had ratified almost all the multilateral conventions drafted by it. The Commission's tasks were particularly important today, when new avenues of universal international co-operation were opening up. It therefore came as no surprise that the international community should turn to the Commission in establishing the programme for the Decade of International Law. Furthermore, in addition to its legislative work, the Commission organized seminars that were the best training for postgraduate students and young professors of international law.

52. He wished to make some general remarks of a technical nature about the Commission's reports. It was not necessary to repeat the history of each topic in every report, or to give a detailed explanation of the consideration of topics at a particular session. Some details were even included both in the section containing

/...

(Mr. Vukas, Yugoslavia)

a general description of the Commission's work and in the individual sections dealing with the consideration of each particular topic. Lastly, it would be useful to know whose opinions were hidden behind such expressions as "some members", "the remark was made" or "a further view was".

53. With regard to the topic "Jurisdictional immunities of States and their property", his delegation would prefer a more neutral language for the title of part III, such as "Cases in which State immunity may not be invoked before the court of another State".

54. As far as the exclusion of immunity of a State in cases of personal injuries and damage to property was concerned, the solution provisionally adopted by the Commission in article 13 met the requirements of justice. However, the consequences of the insertion of any provision on that question into the framework of the topic of State immunity should be carefully studied and harmonized with the rules on State responsibility.

55. In article 18, paragraph 3 (a), his delegation suggested that after the words "a claim in respect of collision or other accidents of navigation" the following phrase based on article 211, paragraph 1, of the United Nations Convention on the Law of the Sea should be added: "Inclusive accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States".

56. Turning to the topic "The law of non-navigational uses of international watercourses", he observed that the draft instrument in question deserved to be called a "framework instrument" as much as the majority of multilateral treaties that represented the progressive development of international law and its codification. Since it was extremely difficult not to enter into details, however, the Commission should not insist on refraining from going beyond the limits of a framework instrument. At the same time, it was questionable whether implementation principles and settlement-of-disputes provisions could be annexed to a framework instrument, as suggested by the Special Rapporteur.

57. On the subject of article 24 as proposed by the Special Rapporteur, his delegation believed that the principle of absence of priority among uses was based on the outdated problem of the priority of navigational uses. Since some priorities should be established, his delegation was glad that it had already been stressed in the Commission in 1990 that domestic and agricultural utilization should be given priority over other uses.

58. In article 25 as proposed by the Special Rapporteur, it would be useful to specify that each watercourse State could regulate an international watercourse on its own territory, provided that such regulation had no negative or harmful effects for any other watercourse State or for the watercourse itself.

59. The principle proposed by the Special Rapporteur in article 28 seemed unrealistic at the current point in time. It was hard to see how States could be

/...

(Mr. Vukas, Yugoslavia)

expected to accept more stringent obligations than those they had been willing to accept in the 1977 Protocols Additional to the Geneva Conventions of 1949.

60. He wished to comment on articles 22 to 27, as provisionally adopted by the Commission at its forty-second session. The use of watercourses, which were only a part of the entire hydrosphere, should be co-ordinated and harmonized as much as possible with the use and protection of the seas. Such a link was closely established in article 25. However, there were some provisions in the articles that differed unnecessarily from the rules adopted for the protection and preservation of the ocean. One could understand the use of the term "ecosystem" instead of "environment" in the specific case of watercourses. Less understandable was the extreme simplification of the definition of "pollution" in comparison with the existing definitions in many treaties.

61. Furthermore, his delegation did not understand why it had been necessary to formulate article 24, on the introduction of alien or new species, in such a way that, contrary to article 196 of the Convention on the Law of the Sea, it seemed that the introduction of such species was prohibited only if it caused harm to other watercourse States and not if it was detrimental only to the ecosystems of the waterways under the jurisdiction of the State that introduced such species.

62. Those provisions, together with others in the draft articles, proved that further harmonization of the draft articles with relevant and generally accepted international rules and standards for the protection of the marine environment was indispensable.

63. Mr. KNOX (United States of America) said that his delegation noted with pleasure that the Commission had had a very productive session with regard to the topic of "The law of the non-navigational uses of international watercourses", having made steady progress towards completing a first reading of a complete set of draft articles by 1991. His country shared the two main objectives of the six articles provisionally adopted by the Commission at its forty-second session, namely to protect and preserve international watercourses from environmental damage, and to protect watercourse States from harmful conditions and emergencies.

64. In its international efforts, the United States had recognized the importance of preventing, reducing and controlling pollution of international watercourses and the marine environment. It was, for example, currently co-operating with Canada in order to control the introduction of zebra mussels, a species that met the requirements of article 24. It was also concerned to prevent harmful conditions and emergency situations of the types described in articles 26 and 27, and to mitigate the damage they caused. To that end, it had concluded joint marine emergency contingency plans with Mexico, Canada and the Soviet Union, and had actively participated in the development of emergency response measures with the Economic Commission for Europe (ECE), the International Maritime Organization (IMO) and OECD, in addition to measures concluded within the framework of regional agreements.

/...

(Mr. Knox, United States)

65. With regard to the specific provisions of part IV, his delegation would welcome a more detailed explanation of the way in which the provisions were intended to relate to those adopted earlier. In particular, it would like the Commission to clarify the relationship between those specific obligations and the fundamental obligations contained in draft articles 6, 7, 8, 9 and 10, since such a clarification would help his delegation to respond more specifically to the provisions of part IV.

66. With regard to part V, his delegation trusted that the Commission would take into account such recent developments in international law as the convention on oil pollution preparedness and response that would soon be concluded under the auspices of IMO and the convention on hazardous installations which was being negotiated within the framework of ECE.

67. With regard to the proposed annex to the draft articles, his delegation agreed with those members of the Commission who had stated that articles 6 to 8 exceeded the scope of a framework agreement. It also noted that, in general, the proposed annex touched on issues of civil liability which were currently under scrutiny in many contexts, notably in connection with the Basel Convention on hazardous wastes and the proposed IMO convention on carriage of hazardous and noxious substances, in addition to other topics currently under consideration by the Commission itself. With regard to article 4 of the annex, his delegation would encourage the Commission to take note of the recently negotiated ECE convention on assessment of environmental impacts in the transboundary context, and in particular the language used in that convention in dealing with the subject of civil liability.

68. His delegation noted the Commission's intention to submit a complete set of draft articles to the Committee in 1991 on the topic of the jurisdictional immunities of States and their property. The draft articles would only be worth while, however, if they were likely to command the broad support of the international community. That would only be possible if the Commission took fully into account the diverse and changing practice of States in that area, which was not the case with the articles as currently drafted. His delegation therefore suggested that the Commission should concentrate less on endeavouring to complete a set of articles that were unlikely to command broad support in the light of various anachronisms, and more on evaluating in detail the current practice of States.

69. Mr. TOMKA (Czechoslovakia) said that his delegation welcomed the progress made by the Commission with respect to the question of jurisdictional immunities of States and their property and hoped that a final draft adopted on second reading would be submitted to the Committee at the forty-sixth session of the General Assembly. The rules governing the jurisdictional immunities of States and their property were not codified in a single law in his country; rather, they were included in its law on private international law and civil procedure and its law on administrative procedure, both of which gave priority to international conventions. The results of the United Nations codification efforts on the subject would have an important influence on his Government's decision whether to adopt a separate law on the topic. His delegation felt that every effort should be made to

(Mr. Tomka, Czechoslovakia)

reach generally acceptable solutions in that area of prime importance for the international community.

70. The draft articles should set out the fundamental principle that States and their property enjoyed immunity from the jurisdiction of the courts of another State. The exceptions to that principle should be established clearly in part III of the draft. His delegation fully supported the proposal by the Special Rapporteur to delete the bracketed phrase included in original article 6 on first reading, since the reference to general international law might raise the possibility of unilateral interpretations of international law by domestic courts and unduly restricted acta jure imperii. His delegation would therefore prefer the heading of part III to read "Exceptions to State Immunity" rather than "Limitations on" or "Restrictions on" such immunity. However, it was open to a different formulation along the lines suggested by the Special Rapporteur or certain other members of the Commission at its forty-second session.

71. His delegation endorsed the inclusion of the various exceptions proposed in articles 11 to 19 of the third report of the Special Rapporteur, but reserved the right to raise the question of the specific language used at a later stage. Upon further reflection, his delegation no longer insisted on the deletion of articles 12 and 13. It agreed with the Special Rapporteur that article 20 should be deleted in view of the controversy it had aroused following its adoption on first reading and the fact that the Commission had not been asked to express an opinion on the territorial effects of nationalization.

72. With respect to part IV, his delegation preferred the second version of articles 21 to 23 proposed by the Special Rapporteur in his most recent report and considered it an improvement.

73. Strictly speaking, the title "Jurisdictional immunities of States and their property" was incorrect, since only States themselves, and not their property, could be the subject of law, whether international or domestic. The language of article 6 adopted on first reading correctly expressed the concept, whereas the language of article 1 and the main title of the draft needed improvement. He was confident that the Commission would make the appropriate clarifications in its final version of the text.

74. He commended the Commission for its progress on the law of the non-navigational uses of international watercourses, particularly since the topic had become of increasingly greater practical importance for many States, including his own. His delegation shared the concerns which had led the Commission to adopt articles 22 to 25, and articles 26 and 27 did not pose any problems for it.

75. With respect to article 26 as proposed by the Special Rapporteur, on joint institutional management, his delegation did not agree with those members of the Commission who felt that the text was superfluous, since articles 4, 9 and 10 already adopted by the Commission contained the necessary elements underlying the legal basis for co-operation among watercourse States. The establishment of a

/...

(Mr. Tomka, Czechoslovakia)

joint body to ensure management should be dealt with in a separate article, and his delegation endorsed the concept underlying article 26. Articles 27 and 28 as proposed by the Special Rapporteur should also be retained.

76. It was not necessary to elaborate an annex on the implementation of the draft articles. The draft was to serve as the basis for the conclusion of a convention or a framework agreement and it therefore was impractical to call for the convening of a Conference of the Parties within two years of the entry into force of the text, as was proposed in article 7 of the annex. Furthermore, the provisions of the Vienna Convention on the Law of Treaties pertaining to amendments were adequate and therefore no separate article on the subject was needed in the Commission's draft. The question of jurisdictional immunity covered in article 6 of the annex should be dealt with in a thorough manner in a different instrument which the Commission was in the process of finalizing.

77. Mr. PAZARCI (Turkey), referring to the draft articles on the law of the non-navigational uses of international watercourses, emphasized his delegation's belief that the Commission's task was to prepare a framework agreement setting out general principles and rules which would subsequently be elaborated upon, on a case-by-case basis, in the light of the interests concerned and the particular circumstances of the region involved. Some of the draft articles contained in the annex proposed by the Special Rapporteur introduced a system of private civil liability. That exceeded the scope of the topic, which should focus on modalities for the use of watercourses rather than on types of sanctions. Moreover, articles 7 and 8 of the annex exceeded the scope of an arrangement which should leave States free to take the appropriate action in respect of the use of watercourses in a specific region.

78. An undesirable shift in the approach to the subject of the use of watercourses had developed in recent years, causing the Commission to stray from the criteria initially adopted. The initial, correct, approach, reflected in articles 2 and 6, was based on the search for a solution which took into account the legitimate interests of both upstream and downstream States, as well as the environment, of all States, affected by international watercourses. However, that broad approach appeared to have given way, in the draft articles provisionally adopted by the Commission at its forty-second session, to a much narrower view which was concerned only with harm to watercourses and the neighbouring environment and did not take into account the water and energy requirements of watercourse States as a whole. The ultimate result was that the draft protected the interests only of downstream States while attributing liability solely to upstream States.

79. If the drafting process continued to be governed by that approach, his delegation feared that the resulting text would deal solely with the uses of international watercourses by upstream States and their attendant obligations. That dangerous approach could be seen in article 23, paragraph 2, adopted provisionally by the Commission. It appeared even more clearly in article 26, which in fact sought to protect only downstream States from drought and desertification while imposing obligations on upstream States, totally disregarding

(Mr. Pazarci, Turkey)

the latter's need for water in order to prevent or mitigate drought or desertification in their own territory. His delegation urged the Special Rapporteur and the Commission to restore the necessary balance between the rights and interests of upstream and downstream States on the basis of justice and equity.

80. The Special Rapporteur frequently referred, in the context of the protection of the marine environment, to a related provision in the United Nations Convention on the Law of the Sea. However, that Convention generally referred to the protection of the international marine environment and not to that of areas under national jurisdiction. Since the Commission was concerned solely with areas under national jurisdiction, it was inappropriate for it to borrow from the Convention the phrase "individually or jointly" in the context of the protective measures to be taken, particularly since the Convention on the Law of the Sea immediately qualified the phrase with the words "as appropriate", and its article 193 recognized the sovereign right of States "to exploit their natural resources pursuant to their environmental policies". The use of the word "jointly" in the draft instrument under consideration appeared to place upstream States at a disadvantage once again, and he urged the deletion of the phrase, or at least its tempering, where used in the draft articles that had been adopted provisionally, particularly articles 25 and 26.

81. Turning to the draft articles introduced by the Special Rapporteur at the Commission's forty-second session, he said that his delegation found articles 24 and 25 to be properly balanced and supported the inclusion of the concepts contained therein. However, it had doubts concerning article 26, on joint institutional management. The text had no foundation in general international law and, given the current status of international law with respect to national sovereignty, it was hard to imagine - unless all the States concerned agreed - that a State could be compelled to accept a role by a third State in the management of a portion of a watercourse on its own territory. While it was true that the draft article imposed only the obligation to consult, the text was too ambitious, since joint institutional management was the stated ultimate objective. At most, consultations could be sought among the riparian States of a particular watercourse to solve common problems pertaining to its management, but only if all the States concerned agreed to the consultation and not solely at the request of one of those States.

82. With respect to article 27, on the protection of water resources and installations, while his delegation endorsed the general idea contained therein, it had doubts particularly with respect to paragraph 2, which might enable a riparian State to abuse its position by attempting to use the proposed consultations as an excuse to monitor or even intervene in the activities of a neighbouring State with respect to the management of portions of a watercourse on the neighbour's territory.

83. Lastly, his delegation endorsed the principle underlying article 28.

/...

84. Mr. LOULICHKI (Morocco), referring to the topic "Jurisdictional immunities of States and their property", said that the Special Rapporteur had endeavoured in his third report to take full account of the views expressed in the Commission and the Sixth Committee in order to arrive at a text which could be adopted in second reading at the next session of the Commission.

85. Since his delegation had already made known its views on articles 1 to 11 bis, it would confine its comments to articles 12 to 28, which had often given rise to differences of opinion within the Commission. In article 12, which was conceived as a limitation on jurisdictional immunity, the Special Rapporteur was trying to reconcile the interests of a State concluding a contract with an individual for a specific purpose with those of the State in whose territory the contract was to be carried out in whole or in part. His delegation approved of the substance of the draft article in that it provided a guarantee to employees recruited by a State of respect for the rights deriving from the contract of employment. At the same time, however, it construed the text on not detracting from the freedom of States to recruit or not to recruit an employee and to renew or not to renew the contract of employment. It followed that the courts of the State in whose territory the contract was performed could only be seized of questions relating to the rights accorded to the employee by the contract of employment and not by the recruitment itself.

86. Article 13 seemed to have a similar purpose. Its effect would be to exclude personal injury and damage to property from the principle of jurisdictional immunity. Since in such cases it would be difficult to obtain diplomatic protection, the injured party must have some effective recourse. However, such recourse should be limited to cases involving injury or damage resulting from traffic accidents, and should only cover compensation.

87. In the same context of limitations on the principle of jurisdictional immunity, the Special Rapporteur had recommended the inclusion in article 15 of a reference to plant breeder's rights and rights in computer-generated works. Those additional elements were of too technical a nature to be incorporated in the international instrument which the Commission was currently drafting, and should therefore be excluded from the draft articles.

88. His delegation was in favour of deleting article 20, which had been conceived as a general reservation clause in cases of nationalization. Since nationalization was a sovereign act, it was not subject to jurisdiction before the courts of another State.

89. His delegation was in favour of merging articles 21 and 22, and hence found merit in new article 21 as proposed by the Special Rapporteur, paragraph 1 (c) of which established the necessary connection between property intended for use for commercial purposes and the object of the claim.

90. With regard to the scope of article 25, which dealt with default judgement, his delegation agreed with the view expressed by some members of the Commission, as reflected in paragraph 233 of the report, that it was incumbent upon the judge to inquire ex officio into the issue of immunity under the draft articles.

(Mr. Loulichki, Morocco)

91. In conclusion, he said that his delegation did not think it necessary to retain article 28, on non-discrimination, since a number of articles in the draft left open the possibility for States parties to the future instrument to extend to each other, by means of an agreement or on the basis of the principle of reciprocity, treatment which was more or less favourable than that provided by the instrument.

92. Mr. AL-BAKER (Qatar) said that there was a tendency to believe that, with regard to the jurisdictional immunities of States and their property, countries were divided into two opposing camps, the wealthy industrialized countries supporting State immunity and the poorer developing countries opposing it. Many eminent jurists rejected such a division and a number of delegations, including his own, had refuted that erroneous view of the situation. It was therefore with some surprise that his delegation had noted the statement in paragraph 217 of the Commission's report to the effect that the industrialized countries were inclined towards restrictive immunity. The time had come to set aside such a false and ideological understanding of the positions adopted by various States and to deal with the legal issue, which was of a technical character, from the point of view of jurisprudence rather than of political attitudes, particularly in a world in which ideological differences were converging. Jurists from different countries would be capable of achieving a harmonious view of the issue when they examined it from an objective, legal point of view and set aside ideological hypotheses that had no scientific basis and no place in the history of the issue under discussion.

93. With regard to article 12 on the topic, and with particular reference to paragraph 178 of the Commission's report, his delegation considered that the criterion for the inclusion or exclusion of labour disputes should not be the nature of the employer but the nature of the work performed by the employee and whether or not it was associated with the exercise of governmental authority. Embassies and other State agencies overseas employed individuals to perform work of the same kind performed by their colleagues in the private sector and which was not associated with the exercise of governmental authority. The acceptance of that criterion would accord with the prevailing trend in the legislation relating to immunity adopted by a number of States in various parts of the world. His delegation therefore supported the view that paragraph 2 (a) of article 12 should be deleted.

94. His delegation did not agree that the words "nor a habitual resident" should be deleted from paragraph 2 (c) of article 12, since the State of the forum had a clear interest in protecting its habitual residents in the same manner as its citizens. That was a widely accepted concept in various fields of international law, so that the assimilation of habitual residents to citizens had been conceded in fields other than that of jurisdictional immunity.

95. His delegation supported the view of those in favour of retaining article 13, since it provided for compensation for death or injury attributable to a foreign State in the territory of the State of the forum. In such circumstances, an injured individual must have the right to seek and obtain compensation. As a

(Mr. Al-Baker, Qatar)

matter of international human rights law, individuals must have some effective recourse. If the draft article was deleted, then the Commission's draft would be incompatible with the laws of those States which had codified jurisdictional immunity, all of which contained such a provision. Deletion of the article would therefore render wide acceptance of the draft less likely.

96. The Government that had proposed adding the words "recognition and enforcement" to subparagraph (c) of article 19, mentioned in paragraph 209 of the Commission's report, had been his own. His delegation had examined the compromise proposal made by the Special Rapporteur that the term "recognition" would suffice, on the understanding that the recognition of the award should be interpreted as the act which entailed "turning the award into a judgement or a title equivalent to a judgement by providing it with an exequatur or some similar judicial certificate", and was of the view that that proposal was acceptable. His country did not therefore insist on the retention of the word "enforcement" alongside "recognition".

97. The eight articles contained in annex I to the draft articles on the law of the non-navigational uses of international watercourses were generally to the point and could arouse no objection. His delegation had been particularly gratified that the word "appreciable" had been used in the various articles of the annex to qualify damage instead of the word "substantial". The Commission had been correct to use that qualification in other draft articles, for example in article 23, paragraph 2.

98. His Government had supported the establishment of an international criminal jurisdiction under the draft Code of Crimes against the Peace and Security of Mankind, and it was of the view that its subject-matter jurisdiction should be limited to the crimes defined in the Code. The court's jurisdiction should be limited to individuals, although his Government had no objection to discussion of the question of extending its jurisdiction to States at a later stage. It nevertheless believed that criminal responsibility was in the first instance the responsibility of individuals who abused their authority in the State. His delegation would prefer an international criminal court with exclusive jurisdiction rather than concurrent jurisdiction between an international criminal court and national courts in view of the nature of the crimes that would be referred to it. If there was any practical possibility of endowing national courts with such jurisdiction, then there would be no need to consider the establishment of an international criminal court at all.

99. His delegation believed that there should be a close relationship between the court and the United Nations in order to enhance its international character. The court should be of moderate size and the judges should represent the main legal systems of the world.

100. In the context of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation approved of the idea of giving more precise meaning to the concept of "significant risk" by

/...

(Mr. Al-Baker, Qatar)

compiling a list of dangerous substances rather than a list of dangerous activities. Any list of the kind must, in its view, be exhaustive. It was the natural or juridical persons engaged in activities that had harmful effects that should be held liable for transboundary harm. The State in whose territory such activity took place should not be considered liable merely on the ground that the damage occurred there. It should be considered liable only if it had actually committed an offence that contributed to the damage, and, the plaintiff who alleged that such an offence had occurred would bear the burden of proof.

The meeting rose at 6 p.m.

/

UNITED NATIONS
General Assembly
FORTY-FIFTH SESSION
Official Records

SIXTH COMMITTEE
27th meeting
held on
Thursday, 1 November 1990
at 10 a.m.
New York

SUMMARY RECORD OF THE 27th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

CONTENTS

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued)

This record is subject to correction.
Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, Room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/45/SR.27
19 November 1990
ENGLISH
ORIGINAL: SPANISH

/...

The meeting was called to order at 10.20 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (*continued*) (A/45/10 and A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (*continued*) (A/45/437)

1. Mr. MAWHINNEY (Canada), referring to international liability for injurious consequences arising out of acts not prohibited by international law, said that his delegation preferred to see separate treatment of activities involving risk and activities with harmful effects. In that connection, he was of the opinion that appreciable harm, not risk, must be the primary factor triggering liability. Risk should, rather, be a factor stimulating preventive measures. If the concept of risk were to be retained in determining liability, the scope of the draft articles would be reduced, since damage, even when considerable, would be excluded when it resulted from low-risk activities. The Committee must not lose sight of the primary objective, namely, compensation for damage incurred independently of the concept of risk.

2. The inclusion of a list of dangerous substances in article 2 of the proposed outline gave rise to some difficulties, since it might narrow the scope of article 1. If the list was included and the concept of risk adopted as a criterion to trigger liability, the convention to be adopted might limit liability and depart from the objective of regulating international liability for injurious consequences from acts not prohibited by international law. As a consequence, greater emphasis should be placed on paragraphs (g), (h), (i), (j) and (n) of article 2, by putting them at the very beginning of the article. Should it be decided to include a list of dangerous substances, which did not seem to be advisable, it could be added as an indicative annex.

3. His delegation did not feel that the State of origin should be able to evade its international liability for harm caused by individuals under its jurisdiction, since, as correctly noted by the Special Rapporteur, an innocent victim must not be left to bear the loss. The Special Rapporteur was also to be commended for his work on protecting areas beyond national jurisdiction, namely, the "global commons".

4. His delegation supported the overall content of the draft articles and was of the view that the international community was justified in adopting the principle of strict liability of States for the activities carried out under their jurisdiction.

5. Mr. YAMADA (Japan), referring to the topic of State responsibility, said that the International Law Commission must carefully consider the concepts of "material injury or damage", "moral injury or damage", "legal injury" and "reparation by equivalent", contained in chapter V of its report (A/45/10). In particular, so as to distinguish moral damage to the State from damage to be compensated for by

(Mr. Yamada, Japan)

reparation by equivalent, the Commission would have to define the concept of "legal injury", which constituted moral damage to the State and was broad enough to cover almost all types of internationally wrongful acts.

6. The Commission should consider the question of injury to the expectations of States caused by violations of treaties relating to the environment, disarmament and trade and other activities, since such injury did not necessarily lead to pecuniary compensation. In that connection it should be noted that the Special Rapporteur, taking a realistic approach, had expressed the view that injury to "expectations" should not necessarily be covered by the general rules under discussion but could be covered by specific treaties.

7. There was general agreement among members of the Commission that consideration of article 8 must be based on the principle that the result of reparation in a broad sense should be the wiping out, to use the Chorzów Factory case dictum, of all the legal and material consequences of the unlawful act in such a manner as to re-establish, in favour of the injured party, the situation that would have existed if the wrongful act had not been committed. Since there was no unanimity as to whether the principle should be concretized in more detailed rules, the Commission should undertake further exhaustive examination of the matter.

8. Moral damage to individuals should be treated differently from moral damage to the State, since they were concepts having different dimensions. On the other hand, the Commission should further consider the criteria of pecuniary compensation by, for example, clarifying the meaning of the phrase "any economically assessable damage".

9. While satisfaction had frequently been granted as an autonomous remedy, it was necessary for the Commission to consider the possibility of describing the nature of that remedy in the draft articles or of listing its modalities in concrete terms. Moreover, the Commission should be careful in introducing the concept of fault into the convention, since that would affect the basic idea underlying the topic of State responsibility. The Commission members should hold consultations on the question, even if the concept of fault was limited to one of the elements to be taken into account in the consideration of the effect of an internationally wrongful act.

10. With regard to chapter VII of the report, relating to international liability for injurious consequences arising out of acts not prohibited by international law, he wondered whether there was any formal agreement to the effect that the objective of drafting a convention of a general nature was to establish a basic "framework" in the same sense in which the Commission understood the term "framework" in the draft articles in chapter IV of the report. If so, it did not seem that the Commission had made a clear decision as to whether to formulate an instrument containing guidelines for the drafting of specific agreements, or one establishing minimum standards which would be legally binding on parties to the convention. Consequently, it was necessary to clarify those points before specifying the scope of activities covered by the convention. In the view of his delegation, it was

(Mr. Yamada, Japan)

necessary to classify clearly the activities covered by the convention in terms of risk and harm. The Commission should then undertake an in-depth examination of the content of the obligation of prevention as well as that of liability for reparation corresponding to each classified activity.

11. With a view to defining the term "activities involving risk", the Special Rapporteur had taken the realistic approach of introducing the concept of dangerous substances in the convention and of enumerating them. In that connection it would be desirable for there to be an exhaustive list of dangerous substances, subject to periodic review.

12. The principles set forth in chapter II of the proposed outline related to a number of controversial issues, such as the relationship between the obligations to take preventive measures and to make reparation, and the principles of prevention and of liability for reparation. In that connection it was not appropriate to treat the general rules of strict liability as general principles of international law in that area. Accordingly, he hoped that the Commission would take a realistic approach to those questions and take into account the provisions of national legislation in various countries. Considering that there was no unanimity of views on the extent to which the State was liable for damage arising from activities performed by private persons, he hoped that the Commission would intensify its consideration of the problems to be dealt with under an international civil liability régime, distinguishing them from those to be dealt with under a State liability régime.

13. In view of the vagueness of the concept of harm to the "global commons", it should be left outside the scope of the convention for the time being. Although there was no doubt that the protection of the "global commons" was a matter of growing importance, it appeared premature to establish new legal principles to regulate international liability in that field. The Commission should examine the possibility of establishing a mechanism for international co-operation in the management of the "global commons".

14. Mr. TREVES (Italy) said that the differences of opinion regarding States responsibility, expressed in the report of the Commission, were due to the fact that the Special Rapporteur had insisted on "progressive development" of the law whenever, in his opinion, mere "codification" would have produced rules lacking the necessary clarity. The Special Rapporteur's logic was particularly apposite in the case of the issues considered in his second report, since the domestic law of countries in matters of tort included very complex concepts for addressing problems which, at least structurally, were the same as those arising in international law. Certain proposals of the Special Rapporteur had met with difficulty because some members of the Commission believed that it was not advisable to make the provisions of international law relating to matters such as reparation by equivalent or satisfaction too precise. Clear examples of that problem were to be found in article 8, paragraph 4 and in article 9, to which objections had been raised based on the concern for maintaining a certain degree of flexibility, which would reflect the existing situation in practice.

/...

(Mr. Treves, Italy)

15. That divergence of views clearly demonstrated that, in order to meet the needs of the international community, the Commission needed to find an appropriate balance between "progressive development" and "codification". Progressive development added dynamism to international law and helped to make it consonant with current needs; nevertheless, excessive progressive development could be unacceptable to States and might ultimately contribute to the failure of projects.

16. In some other cases, differences of opinion among the members of the Commission were based more on terminology than on substantive issues; that seemed particularly clear when using the term "punitive damages" to reflect the "punitive nature" of satisfaction. It was inappropriate to contend that the concept of "punitive damages" might be inconsistent with sovereign equality of States. It seemed evident that, although in some cases "satisfaction" took the form of the payment of a sum, that sum should not be labelled as compensation. Similarly, it might be inappropriate to use the word "punitive". Nevertheless, it seemed clear that, to a certain extent, "punishment" or "retribution" were simply the other side of the coin of "satisfaction": the injured State was satisfied in seeing the wrongdoing State suffer as a result of its act. Thus, to prevent abuses, a provision existed according to which satisfaction should in no case include "humiliating demands" on the State which had committed the wrongful act.

17. With respect to international liability for injurious consequences arising out of acts not prohibited by international law, the Commission already had a complete outline of the draft articles, which allowed each provision to be seen in perspective and permitted a comparison of the draft articles with related Commission projects on international watercourses and international responsibility. With that in mind, he reiterated his opinion that it would be useful to have some co-ordination between the topics considered in chapters IV and VII of the Commission's report, because in many ways the respective projects were concerned with the same problems. Furthermore, it seemed the right time for deciding whether the articles on liability should encompass only general principles or include many details. The current trend seemed to be towards the latter alternative. For that reason, the Italian delegation could not respond positively to one of the specific questions raised by the Commission on that topic, namely, whether the concept of significant risk should be clarified by the introduction of a list of dangerous substances. That type of list was appropriate for conventions on particular subjects, but might create conflicts in a general convention.

18. Article 18 demonstrated clearly the difficulty of drawing a line between its topic and that of international responsibility. If a convention were to include the obligations of prevention, there was no reason why failure to comply therewith should not constitute a wrongful act and entail responsibility.

19. With regard to the second question to which Governments had been asked to respond, his delegation considered that payment for damage resulting from the activities referred to in the draft articles should be as complete as possible and that the burdens borne by States and private parties should complement each other. That would mean that the rules in chapters IV and V should be interpreted as parts

(Mr. Treves, Italy)

of a whole. Damage imputable to private operators and paid to the injured persons in accordance with domestic law should not be paid by States. In that context, schemes for compulsory insurance and the creation of compensation funds would be useful. States should be liable for payment of those damages which could not be recovered through domestic law mechanisms. In any case, the principle of residuary liability should be applied with a certain amount of flexibility.

20. The speaker expressed his satisfaction at the fact that the Special Rapporteur had considered the question of liability for harm to the environment in areas beyond national jurisdiction (global commons). That analysis was a stimulating exploration of uncharted territory, which raised highly complicated issues and merited in-depth study.

21. Mr. CRAWFORD (Australia) said, with respect to the topic of State responsibility, that it was difficult to comment on articles 8 to 10, discussed by the Commission earlier in 1990, without considering them in the overall context of Part II of the project. In 1989, his delegation had made some comments on that subject, in particular on draft article 7, and had called for a greater degree of flexibility in the formulation of the principle of restituo in integrum. Those comments had some bearing on the draft articles under consideration. Against that background, he would make two general and two specific comments.

22. The first general comment related to the issue of fault. His delegation believed that, in principle, the concept of fault did not play a major role in determining the consequences of an internationally wrongful act. Once it had been determined that there had been a breach of an international obligation, there was little room for attenuating the obligation of restituo in integrum and its alternatives. It was therefore difficult to elaborate general rules for determining the impact of fault in the remedial context; it was better to subsume it under the broad notion of appropriateness or reasonableness, which could not be excluded from that field. The second general comment related to the slightly uneven approach taken in draft articles 8 to 10, in which the issues were stated at times in terms of the obligation of the wrongdoing State and at other times in terms of the rights of the injured State.

23. With respect to specific articles, he had a mild preference for alternative (a) in draft article 8, paragraph 1, as it appeared to be more flexible. Also, draft article 8, paragraph 5, should use the wording "may be reduced" rather than "shall be reduced". With respect to draft article 9, in addition to the inadvisability of deleting paragraph 1, it was difficult to understand why the award of interest was limited to compensation due for loss of profits, since in principle any amount due and unpaid could earn interest.

24. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he welcomed the comprehensive outline of the draft articles provided by the Special Rapporteur. With respect to the matters on which the views of the Sixth Committee were sought (para. 531 of the report of the Commission), he made the following observations.

/...

(Mr. Crawford, Australia)

First, with respect to subparagraph (a), on the question as to whether the draft articles should contain a list of harmful substances, his delegation was not convinced of the appropriateness of the proposal. The list was intended only to assist in defining significant risk and not in defining harmful effects. Furthermore, a more fundamental difficulty was the fact that the draft articles were concerned with acts, not with substances. With respect to subparagraph (b), the issue as to whether a State or a private operator bore liability raised a basic difficulty. In Australia's view, a State had an international obligation to prevent appreciable transboundary harm which, if breached, would entail liability. For that reason, his Government endorsed the approach of including in the articles a clear statement of the obligation to pay compensation, rather than merely an obligation to negotiate. In any statement of international law, it was the obligation and liability of the international actor, the State, that was in question. In customary law, the more general position was that the State had certain responsibilities and liabilities and that it was for the State, by means of its internal law, to settle the matter of responsibility between itself and its private operators.

25. While it would be premature to comment in detail on individual articles, considerable progress had been made in distinguishing between prevention and liability. On the other hand, a breach of the procedural obligations in articles 11, 13 and 14 should be regarded as a breach of an international obligation for which a State could seek redress independently of any harm. The fact that those provisions were procedural in character did not make them any less of an obligation. Part III, which might better be entitled "Assessment, Notification and Prevention", therefore needed further refinement. In particular, it was desirable to distinguish between prevention and notification and to make it clear that draft article 18 was without prejudice to other international obligations.

26. Although the principle stated in draft article 20 was acceptable, he agreed with those members of the Commission who were concerned about the appropriate threshold to trigger that provision. It was by no means clear that the courts of the injured State provided the appropriate forum to determine disputes arising under the draft articles, at least where the defendant was the State of origin itself, as referred to in draft articles 29 (c) and 31. There was a need for consistency between that provision and draft article 13 of the draft articles on jurisdictional immunities of States and their property. He welcomed the initial work on the treatment of harm done to the global commons and recommended its continuation.

27. Mr. HEROUY (Ethiopia), referring to the draft Code of crimes against the peace and security of mankind, and particularly to draft articles 15, 16 and 17, dealing respectively with complicity, conspiracy and attempt, said that one of the main issues involved the question of methodology, namely, whether those offences should be treated separately, as belonging to the special part, or as general principles, belonging to the general part of the draft Code. His delegation preferred the second alternative. With regard to defining the concept of complicity, conspiracy

(Mr. Herouy, Ethiopia)

and attempt, it might be prudent to avoid a detailed definition which could lead to controversy over interpretation and the scope of application. The determination should be left to the judge in each specific case.

28. In connection with illicit drug trafficking, the two texts submitted by the Special Rapporteur were designed to make international traffic in narcotic drugs a crime against peace and a crime against humanity (arts. X and Y). His delegation was interested in the two-pronged approach of the Special Rapporteur, especially in the light of the discussion it had generated in the Commission. It also saw the merit of a single provision, as suggested by some members of the Commission who had argued that drug trafficking should be treated only as a crime against humanity (para. 80 of the report).

29. Regarding the intractable problem of including in the Code a provision dealing with a breach of a treaty designed to ensure international peace and security, he shared the concern of those members of the Commission who opposed the idea. Such a provision could undermine the principle of universality, on which the concept of crimes against the peace and security of mankind was based and could give rise to questions relating to the relatively settled area of treaty law. It would be far more desirable either to drop the subject totally or, at the very least, defer it indefinitely to be re-examined only after consideration of the other draft articles had been completed.

30. Regarding the establishment of an international criminal jurisdiction, his delegation noted with satisfaction that, in its in-depth examination of the question, the Commission had adopted the practical approach of taking account of previous United Nations efforts in that field. Since the concept of international crime was broader in scope and application than that of crimes against the peace and security of mankind, Ethiopia was in favour of limiting the jurisdiction of the court to the crimes under the Code. In accordance with basic principles of international law, cases should be brought before the court by States parties to the statute. His delegation therefore maintained that to be bound by the decision of the court, or indeed even to accept its jurisdiction, required the consent of the State concerned.

31. Turning to the law on the non-navigational uses of international watercourses, his delegation noted that further progress had been made in the study of the topic and was heartened by the reassurance that there was general agreement on the meaning of the term "framework agreement", as succinctly stated in paragraph 257 of the report. It was in favour of that approach, which increased the chances of accepting the instrument. As for specific draft articles, Ethiopia had no difficulty with the principle enunciated in article 24, paragraph 1, because the absence of priority among uses of watercourses reaffirmed the principle of permanent sovereignty of States over their natural resources. However, in addressing itself to conflict situations and venturing into the field of dispute settlements, article 24, paragraph 2, went beyond the scope of the draft and beyond the Commission's competence (para. 265 of the report).

/...

(Mr. Herouy, Ethiopia)

32. With respect to article 25, the term "regulation" was too vague to warrant any observation or comment at the current stage. He hoped to see a definition of the term in due course. He also found the formulation of article 26 a fundamental departure from the framework agreement approach and favoured recommendations of a general nature which left room for, and took account of, each specific situation. As a general observation, he endorsed the view expressed in the second part of paragraph 278 of the report. The wording of article 26, paragraph 1, was hardly acceptable. While consultation was desirable in principle and was the corner-stone of co-operation among riparian States, the obligation of consultation should be contingent upon and subject to specific conditions. The obligation to start consultations at the request of any State was going too far. The formulation of paragraph 1 did not serve the objective that it tried to attain, namely, the establishment of a joint organization for the management of an international watercourse. The Commission should look further into the problems posed in that paragraph.

33. Ethiopia agreed with the general thrust of article 27 but shared the concern that reference to the protection of watercourses as distinct from installations might broaden the scope of the provision which should be limited to installations. It would, however, be prepared to consider other criteria and would return to the subject later. So far as article 28 was concerned, there was no point in embarking on the delicate theme of armed conflict, which was beyond the scope of the draft articles.

34. Regarding implementation of the draft articles, the commitments in the annex were more appropriate for a small closely-knit group of States and some of the commitments might require changes in national laws and go beyond the limits of a framework agreement. At all events, questions concerning implementation in general and the provisions in the annex in particular should be dealt with after completion of the work on the remainder of the draft articles.

The meeting rose at 11.25 a.m.

UNITED NATIONS
General Assembly
FORTY-FIFTH SESSION
Official Records

SIXTH COMMITTEE
28th meeting
held on
Thursday, 1 November 1990
at 3 p.m.
New York

SUMMARY RECORD OF THE 28th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

CONTENTS

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (*continued*)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (*continued*)

This record is subject to correction.
Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, Room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/45/SR.28
7 November 1990

ORIGINAL: ENGLISH

/...

The meeting was called to order at 3.15 p.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (*continued*) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (*continued*) (A/45/437)

1. Mr. AL-SABEEH (Kuwait) said that since the end of the First World War the need had been felt for a body of international criminal law and for an international criminal jurisdiction. The United Nations had worked continuously on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind and on the establishment of an international criminal court, but many countries differed on what crimes should come under such a law and jurisdiction.

2. The Iraqi régime's war crimes, aggression, colonization, forcible annexation, collective extermination, crimes against diplomats, torture, use of mercenaries, kidnapping of innocent people for use as human shields, terrorism, organized looting, forcible eviction and deportation of innocent people whose only "crime" was piety and patriotism all underscored the urgent need for the establishment of such a jurisdiction and court. The inhuman practices of Saddam Hussein's thugs, directed against both the people and institutions of Kuwait and the many foreign nationals living there, were manifestly intended to annihilate Kuwait's entire economic, social, health, financial, oil, educational and cultural infrastructure, in blatant violation of the principles of international law, the third and fourth Geneva Conventions and all other relevant international treaties and charters.

3. Kuwaiti children constituted 40 per cent of the population and those aged 6 to 16 attended school and he drew attention to the fact that Iraqi occupation forces had wrecked all educational, cultural and scientific institutions, burnt books, records and public libraries, and had in addition plundered research centres, computers, audio visual equipment, tables, chairs, blackboards and even chalk. Furthermore they had destroyed all the broadcasting and publishing facilities, archives and data banks, and plundered museums, archeological treasures and irreplaceable manuscript collections, sending their booty off to Baghdad.

4. The occupation troops had seized Kuwaiti hospitals for their own use, expelling patients or leaving them to die, forcing out mothers two hours after childbirth, torturing, killing, raping and throwing out medical staff, commandeering ambulances and stealing medical supplies, equipment and even cribs, leaving new-born babies to die on the floor. The Iraqi army had also prevented the Kuwaiti Red Crescent from carrying out its humanitarian duty and had then dissolved it, confiscating its property and detaining or murdering some of its personnel.

5. The Iraqi occupation forces had plundered banks, looted shops and stolen billions of dollars worth of Kuwaiti and foreign currency and Kuwaiti gold reserves. They had also stolen Kuwaiti aircraft, air tickets, spare parts and "high-tech" equipment belonging to the airlines, had seized cranes from Kuwaiti

/...

(Mr. Al-Sabeeh, Kuwait)

ports and the contents of Kuwaiti warehouses and factories, had dismantled filling stations and had mined oil wells and refineries.

6. Such was the long list of the Butcher of Baghdad's repugnant crimes committed not only against Kuwait but also against the peace and security of mankind. The evil and spiteful impulses of an unbalanced and bloodthirsty murderer should not be allowed to wreak havoc on Kuwait and threaten the world at large. With the help of God and assistance from the peace-loving and justice-loving countries of the world, a free and independent Kuwait would emerge and be rebuilt. Its people and Government would eventually bring to trial the Iraqi war criminals who constituted a threat to international peace and security.

7. Mr. BELLOUKI (Morocco) said that the topic of the non-navigational uses of international watercourses was of particular importance for many developing countries where drought and desertification were a constant threat, and where rational management of water resources and preservation of water quality were vital for a growing population. The framework agreement being prepared by the International Law Commission would enable riparian States of an international watercourse to co-operate to their mutual advantage.

8. The title of article 24, "Relationship between navigational and non-navigational uses; absence of priority among users", should be shortened after the word "uses". In paragraph 1, the expression "in the absence of agreement to the contrary" enabled users to decide how to derive maximum benefit from a given international watercourse. Obviously any use must exclude damage to water quality. Paragraph 2 was generally acceptable but would be more comprehensive if the obligation not to cause appreciable harm to other States was mentioned in a reference to draft article 8.

9. Draft article 25, "Regulation of international watercourses", concerned the way in which optimal use could be made of a watercourse. Co-operation between watercourse States should be more than a moral obligation, should be undertaken at the bilateral or multilateral level and should exclude political differences.

10. The French text of article 25, paragraph 2, should be harmonized with article 24, paragraph 1, by using the phrase "*à moins qu'il ne soit convenu autrement*". Equitable participation of watercourse States in regulation should be in proportion to the benefits which each of them derived from the watercourse, and the term "regulation" must be defined.

11. Paragraph 1 of draft article 26, as proposed by the Special Rapporteur, established an obligation which was widely honoured in practice by watercourse States. Consultations were the best way of ensuring appropriate management and protection of the watercourse, but they could not be effective without a legal framework for co-operation. If an organization responsible for management and the peaceful settlement of disputes were to be established, in principle by an international agreement, overlapping with draft article 4 on watercourse agreements must be avoided.

12. In paragraph 2 the chapeau should have the following wording: "The functions of the joint organization shall be, *inter alia*, the following:". In order to

/...

(Mr. Bellouki, Morocco)

simplify the article, the chapeau of paragraph 3 could be deleted, and subparagraphs (a) and (b) added to the indicative list of functions mentioned in paragraph 2.

13. Draft article 27, "Protection of water resources and installations", should be amended to avoid overlapping with other draft articles and to bring out the essential nature of the protection of water resources and installations and the obligatory nature of consultations between the watercourse States.

14. The Special Rapporteur had also submitted draft article 28, entitled "Status of international watercourses and water installations in time of armed conflict". The inviolability of international watercourses and related installations, facilities and other works should be an obligation founded in international law, to the extent that the humanitarian principles governing such issues were generally recognized. Watercourses must not be used for military purposes or poisoned in violation of the rules of international humanitarian law.

15. The Special Rapporteur's annex should be reduced and harmonized with States' liability with fault and liability without fault. Draft article 1, draft article 3, paragraph 1, and draft article 4 of the annex could be retained.

16. Watercourse States should establish the structures and guidelines for fulfilling their obligations under the framework agreement. Draft articles 7 and 8 should be recast to make their content acceptable. The definitions of the terms used in the draft articles were scattered throughout the text and should be transferred to draft article 1, on Use of terms.

17. Draft article 2, as adopted provisionally by the Commission, stated that the articles applied to uses of international watercourses and to measures of conservation related to those uses. However, draft article 6 also mentioned the development and protection of watercourses, while draft article 7, paragraph 1 (e), mentioned protection and development in addition to conservation. The two terms "utilization" and "protection" were mentioned in draft article 9. The draft article on the scope of the articles should therefore also cover the development, protection, utilization and conservation of watercourses.

18. His delegation welcomed the provisional adoption of draft articles 22 to 27 at the forty-second session of the Commission. However, to comply with their obligations in respect of the protection and preservation of ecosystems and the marine environment, developing countries, despite their goodwill, sometimes required appropriate assistance.

19. Turning to the topic of State responsibility, he said that the questions dealt with by the Special Rapporteur in his second report and the dicussions to which they had given rise in the Commission were an indication of the interest shown in that important and complex aspect of international law. The Special Rapporteur had proposed three new draft articles, article 8 of which provided for compensation for any damage not covered by restitution in kind which was economically assessable.

/...

(Mr. Bellouki, Morocco)

The effort to codify and develop international law in matters of compensation required a flexible and cautious approach, and the principle of equity must predominate. The Chorzów Factory case had given rise to reasonable guidelines which could provide the basis for general rules which could be adjusted to each case.

20. Although restitution in kind was discussed in the commentary to draft article 7, the absence of an agreed definition was not conducive to understanding the proposed draft article 8. Although alternative (a) of paragraph 1 of the draft article was broadly satisfactory, it would be preferable for the French text to start with the words "l'Etat lésé a le droit d'exiger" and for the text to mention the obligation to pay compensation.

21. Paragraph 2 should deal primarily with compensation for such material harm directly caused to the State as was economically assessable, in order to permit calculation of equitable and reasonable compensation. The component elements of moral damage were too abstract, so that such damage was difficult to quantify in most cases. The concept merited further investigation.

22. Paragraph 3 should be recast in the interest of clarity and be based on the idea of a loss of actual and not hypothetical profit. In paragraph 4, the expression "an uninterrupted causal link" was unclear: the causal link between the damage and the internationally wrongful act must be direct, exclusive and continuous. Paragraph 5 introduced the logical criterion of proportionality, and was thus acceptable. Since its content might apply to reparation in general, it should be made a separate article.

23. With regard to draft article 9, interest should be calculated by the tribunal, taking into account the circumstances specific to each case. The idea of the draft article might be more acceptable if incorporated, in very general terms, in a paragraph of draft article 8.

24. The Special Rapporteur had also proposed draft article 10, entitled "Satisfaction and guarantees of non-repetition". In the context of reparation for moral injury, it was evident that the State committing the internationally wrongful act should not be humiliated and that its sovereignty should not be impaired. For that reason, the punitive and disproportionate nature of compensation by satisfaction must be mitigated. Similarly, the guarantees of non-repetition of the internationally wrongful act should not be imperative in cases of *force majeure* and failure to foresee. Compensation and satisfaction might on occasion coincide when the injured State and the State committing the internationally wrongful act agreed on a political settlement.

25. The issue of the impact of fault on the forms and degrees of reparation, was still complex, although there had been agreement on recognizing fault as having a certain role in the liability of States both for crimes and delicts. It was, however, difficult to establish how fault could be attributed to a State, and how a State's deliberate intention or negligence could be determined. Responsibility in

/...

(Mr. Bellouki, Morocco)

such cases often lay with different government bodies at different levels. A cautious approach to the problem was thus called for, but its solution would be an important step forward in the development of international law.

26. Mr. ECONOMIDES (Greece), referring to chapter II of the report, said that his delegation approved of the three new articles provisionally adopted, on international terrorism, mercenaries and the illicit traffic in narcotic drugs. It did not, however, consider that the criminal nature of terrorist acts had been sufficiently defined and wondered whether those articles should be retained. International terrorism should also be made a criminal offence, since it involved acts committed by individuals and, like drug trafficking, by its very nature constituted a crime against humanity.

27. His delegation stressed the complex and difficult nature of the three articles relating to complicity, conspiracy and attempt. All three raised issues which must be handled with due attention and caution.

28. Greece had expressed its support for the establishment of an international criminal court having competence solely for the crimes to be defined in the draft Code. Such competence would, for obvious reasons, be exclusive in the case of crimes against peace and concurrent in that of crimes against humanity.

29. With regard to the idea of including a provision concerning the breach of a treaty designed to ensure international peace and security (paragraphs 89 to 92 of the report), his delegation could not support the proposal. First, treaties of that kind were generally antiquated and their validity might be doubtful. Secondly, such a provision, if adopted, would have to be followed by so many exceptions that it would be extremely difficult, if not impossible, to apply. Thirdly, the law of treaties, the law of international responsibility and the law of the collective security of the United Nations should be amply sufficient to cover such cases.

30. In the light of recent events in the Gulf crisis, he recalled a proposal he had made in 1989. The draft Code established, as crimes against peace, the threat of aggression (article 13) and aggression itself (article 12), but the two articles did not cover criminal acts committed after an act of aggression. He had in mind illegal annexation, as had been perpetrated against Kuwait, or the artificial creation of a case of illegal succession of States, as had occurred at the expense of the Republic of Cyprus. The draft Code should therefore go further by providing penalties for all acts carried out by the aggressor in order to ensure his illegal domination, such as the illegal occupation, annexation and sucession of States. Each State, and the international community as a whole, had a duty to bring about full restoration of international legality. For that reason, the draft Code should include a new provision worded on the following lines: "It is a crime against peace deliberately to disregard binding decisions of the Security Council intended to end a case of aggression and to eliminate its illegal consequences". He hoped that the Special Rapporteur and the International Law Commission would consider that proposal.

/...

(Mr. Economides, Greece)

31. Turning to chapter IV of the report, which dealt with the law of the non-navigational uses of international watercourses, he said that draft articles 22 to 27, as provisionally adopted by the Commission, seemed on the whole to be satisfactory. They were largely based on the Convention on the Law of the Sea and other relevant international instruments. In particular, his delegation supported the use of the word "ecosystem". However, the requisite balance had not yet been achieved, in article 23, paragraph 2, between the rights of upstream and downstream countries. In addition to the prevention, reduction and control of pollution, the paragraph should make provision, if only under certain conditions, for the elimination of pollution. Similarly, in article 26, after the words "prevent" and "mitigate", the terms "control" and, if possible, "eliminate" should be added.

32. With regard to article 24, due account should be taken of certain specific interests, particularly in connection with small rivers, such as the protection of public health and maintaining suitable water quality for domestic and agricultural uses, interests which might be of vital importance for some regions. A suggestion to that effect was made in paragraph 262 of the report.

33. Article 25, and in particular the term "regulation" should be made more specific. Article 26 was one of the key provisions of the draft. Paragraph 1 of article 27 should be worded more restrictively. Finally, article 28 should take into account the rules governing the law of armed conflict, and should in particular contain certain definitions mentioned in paragraph 297 of the report, such as poisoning of water resources and the diversion of rivers from their courses. In addition, the term "inviolable" was scarcely comprehensible in the context of the article and should be clarified.

34. Finally, annex I, and particularly its first five articles, seemed positive and useful. His delegation could, however, accept the idea of incorporating those provisions in an optional protocol.

35. Some delegations had criticized the draft under consideration, taking the view that it benefited downstream more than upstream countries. He did not share that opinion. The concept of "appreciable harm", used in article 8 and other provisions of the draft, clearly proved the contrary and his delegation held reservations with regard to use of the term "appreciable".

36. In conclusion, he expressed the hope that the draft articles would be completed in second reading at the 1991 session of the Commission: they were of extreme urgency and should be finalized as soon as possible as a framework agreement.

37. Mr. SCHARIOTH (Germany) said that there had been a recent tendency in international law to limit the immunity of States from the jurisdiction of the courts of other States - a necessary development in view of the increase in international exchanges and co-operation among States. Germany favoured a limiting approach to the principle of State immunity, a practice which was also followed by the German courts.

/...

(Mr. Scharioth, Germany)

38. Turning to chapter III of the report, he welcomed the combination of original articles 2 and 3 to form new article 2 and the Special Rapporteur's proposal to change the words "commercial contract" in paragraph 1 (c) to read "commercial transaction". However, the article continued to provide that, in determining whether an activity was a commercial transaction, not only its nature but also its purpose should be taken into account. As the determination of whether an activity was a "commercial transaction" was currently governed not by an agreement between the States concerned but by their practice, it would be hard for contracting parties to predict how an activity would be classified. Accordingly, he continued to advocate that the nature of a transaction should be the sole criterion.

39. With regard to article 11 bis, the revised draft submitted by the Special Rapporteur was far clearer than the original draft and made it obvious that the provision was indeed intended to grant immunity. As a minimum requirement for granting immunity, transparency must be ensured with regard to the capital resources of the State enterprise, for example, by means of a commercial register. The second sentence established an exemption from immunity in the event of claims on the State where a State enterprise acted on its behalf. While that exemption was welcome, in such cases the transaction would generally be concluded in the name of the State, so that the latter was the contracting party and would not be granted immunity under article 11.

40. With regard to the title of chapter III, part III, it would be expedient to find a neutral wording which would obviate the need for a commentary on the divergent theories of absolute and relative immunity.

41. With regard to draft article 12, he favoured a greater limitation of immunity than that contemplated in the draft adopted by the Drafting Committee, particularly in the case of labour-law disputes. The misgivings expressed by some States regarding the deletion of subparagraph (a) could be taken into account by the Special Rapporteur's proposal as set out in paragraph 177.

42. In the case of draft article 13, the Drafting Committee had not adopted the Special Rapporteur's suggestion, which his delegation had welcomed, namely, to delete the last half of the sentence. As adopted by the Drafting Committee, the text could be interpreted to mean that immunity could always be invoked for transboundary injuries or damage.

43. He supported the Special Rapporteur's recommendation to delete the word "non-governmental" in draft article 18, paragraphs 1 and 4, because the criterion of "commercial purpose" was in itself sufficient to ensure that immunity was not granted. With regard to draft article 21, differences between immunity granted for contentious proceedings and for enforcement proceedings should be kept to a minimum. He supported the Special Rapporteur's proposal that draft articles 21 and 22 should be merged. New article 21 took into account his delegation's view that the phrase in original article 21 "[, or property in which it has a legally protected interest,]" resulted in an undesirable expansion of immunity. The question of whether the phrase "[and has a connection with the object of the claim,

(Mr. Scharioth, Germany)

or with the agency or instrumentality against which the proceeding was directed]" should be maintained in new article 21, paragraph 1 (c), required further examination, although deletion would appear to be indicated. The words "and used for monetary purposes" which had been added to new article 22, paragraph 1 (c), reflected a request by his delegation.

44. New article 23 appeared to be expedient, in that if a State could invoke immunity in contentious proceedings where an autonomous State entity which pursued commercial purposes was liable, forced execution on the State's property must be possible where the State placed such property at the disposal of the autonomous State entity for commercial purposes.

45. He welcomed the suggestion that the words "and if the court had jurisdiction in accordance with the present articles" should be added to draft article 25, paragraph 1, and interpreted the addition to mean that the question of immunity must be examined by the court *ex officio*.

46. With regard to the law of the non-navigational uses of international watercourses, Germany, as a riparian State of several major watercourses, was particularly interested in the development of international law in the field of environmental protection. The Commission had drafted language which made it sufficiently clear when riparian States of international watercourses must take action to prevent or reduce any harmful effect of certain conditions or human conduct on other watercourse States or their environment. The proposed articles were also closely related to other rules of international law serving the same purpose; that close link with existing conventions would be conducive to establishing the most comprehensive system possible of complementary global and regional régimes of international watercourses.

47. Draft article 23 imposed a general obligation on watercourse States to prevent and reduce pollution of international watercourses, and in addition, its paragraph 3 required them to co-operate in identifying harmful substances. That provision underscored the concept of preventive measures to protect watercourses. Draft article 24 was a forward-looking provision in that it took account of the introduction of "new species" into international watercourses. Draft article 25 represented an important addition to global and regional efforts to protect the marine environment. His country, bordering on the heavily polluted North and Baltic Seas, realized that rivers must not be cleaned up at the expense of the marine environment. Draft article 26 made it clear that the responsibility of watercourse States included not only practices in their sphere of competence but also other sources of hazard. Under draft article 27, a wide-ranging provision which also included non-contracting States, watercourse States would be obliged to prepare jointly for emergency situations and to take appropriate action if they arose.

48. With regard to the definition of an international watercourse, he reiterated his view that the draft articles should use the wider term "international watercourse system" so as to ensure the most comprehensive and effective protection possible.

(Mr. Scharioth, Germany)

49. The eight draft articles proposed for annex I required further examination. He welcomed the approach taken by those provisions and felt that three central ideas should be emphasized: first, the principle that watercourse States should attach the same importance to possible adverse effects on other States of activities in their territories as to such effects in their own territory; second, the equal treatment of natural or juridical persons in other States and of those in the watercourse States of origin in respect of the prevention of and information on possible hazards as well as compensation where damage had actually occurred; third, the strengthening of the position of private persons in exercising those rights. Those principles were consistent with current trends in environmental policy and were increasingly being incorporated into international instruments designed to protect the rights of the individual against transboundary hazards. In that context, he had no objection to the wording of articles 1, 2, 3, 4, paragraph 1, and article 6, except to ask whether article 4, paragraph 1, and article 5 did not place obligations on future contracting States which were too extensive and too difficult to define.

50. Understandably individuals who might potentially be affected would also wish to be involved in the preparation in other States of decisions designed to avoid hazards. However, a legal claim to be involved similar to that granted by the national law of other States to their own nationals or organizations would place a great strain on such procedures. Of course, the provisions proposed by the Special Rapporteur were virgin territory for many States. The national legislation and different legal traditions of Member States suggested that it might be possible to reach agreement only on the lowest common denominator. That applied especially to the status of private individuals.

51. Mr. CALERO RODRIGUES (Brazil) said that only slow progress had been achieved on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law (chapters V and VII, respectively, of the Commission's report). Given their complexity that was understandable, but the point should have been reached from which the Commission could move at a faster and more steady pace. The results of the forty-second session's work were only mildly satisfying, no general agreement having been reached on some basic issues. The Commission and the two Special Rapporteurs should be encouraged to ensure the successful early completion of the work, thus making a signal contribution to the Decade of International Law.

52. It was particularly to be regretted that in connection with State responsibility the Commission had failed to indicate the specific issues on which the expression of views by Governments would be of special interest for the continuation of its work, as had been requested in General Assembly resolutions of which resolution 44/35 was the most recent. Too many questions were raised by the draft articles on State responsibility for any delegation in the Sixth Committee to address them all. Without guidance from the Commission, comments were likely to be made at random, and some delegations might even feel tempted not to state their positions at all, fearing that their view might not be of use for the continuation of the Commission's work on the topic.

(Mr. Calero Rodrigues, Brazil)

53. Referring to article 8 of the draft on State responsibility, he agreed with the view expressed in the Commission and endorsed by the Special Rapporteur (paragraphs 345 and 347 of the report) that the present title should be changed to "Pecuniary compensation". There was no substantive difference between the two alternative versions proposed for paragraph 1 of the article, and the indication of the purpose of pecuniary compensation could be simplified, if, as previously suggested by his delegation, article 7 on restitution were to be drafted more clearly.

54. Referring to article 8, paragraph 2, he said that the expression "any economically assessable damage" was appropriate; the expression "material damage" might appear preferable at first sight, but it could be interpreted in the narrow sense of physical damage, not covering damage to some rights such as intellectual rights, which might represent considerable economic loss. The paragraph also spoke of "any moral damage", but seemed to imply that only such moral damage as was "economically assessable" was meant. To consider that no moral damage to the State was economically assessable while some moral damage to individuals could be so assessed seemed illogical; notwithstanding the arguments advanced by the Special Rapporteur in favour of his position, his delegation saw no need to single out damage to nationals in either article 8 or article 10. If damage to a national could be economically assessed, it should give rise to an obligation of compensation; if it could not, there should be an obligation of satisfaction.

55. His delegation agreed that the damage to be compensated included both damnum emergens and lucrum cessans; it was not satisfied, however, with the definition of lucrum cessans proposed in article 8, paragraph 3. Not only was the phrase somewhat oddly turned, but it also failed to specify what was to be considered a loss of profits. It was to be hoped that the Commission would arrive at a more convincing wording.

56. While his delegation had some doubts regarding the expression "an uninterrupted causal link" used in paragraph 4 of the article, even with the explanation provided by the Special Rapporteur in paragraph 371 of the report, it was still more skeptical about some of the suggestions made in the Commission and reflected in paragraph 372. If the Commission could agree that "the cause must not be too remote or speculative" and that there should be "a sufficiently direct causal relationship" between the wrongful act and the damage, as some members had argued, then the best answer might indeed be to provide an adequate explanation of the expression "uninterrupted causal link" in the commentary.

57. The principle set forth in paragraph 5 of the article, namely, that the State which committed a wrongful act was responsible only for the damage caused by that act, was a truism and, as such, unlikely to be disputed. That being so, it was hardly appropriate to speak of the compensation being "reduced accordingly"; in fact, compensation should not be reduced but should simply apply to that part of the damage which had been caused by the wrongful act. The reference to possible "contributary negligence" on the part of the injured State appeared unnecessary; if the injured State concurred in causing the damage, the part of the damage thus

/...

(Mr. Calero Rodrigues, Brazil)

caused obviously could not be attributed to the wrongful act. That was a simple consequence of the principle of apportionment of damage and did not require to be mentioned in the text. He did not propose to comment on article 9, since many members of the Commission had spoken in favour of its deletion and the Special Rapporteur, in paragraph 387 of the report, had agreed with that suggestion.

58. The reference to legal injury in article 10, paragraph 1, was inappropriate. Satisfaction in the forms indicated in the paragraph was not due for every wrongful act but was reserved for instances of moral injury, traditionally equated with injury to a State's dignity, honour or prestige. The text should make it perfectly clear that satisfaction was the remedy to be applied to a moral injury in its traditional sense and not to legal injury, a much wider concept; even some precision should be given to the concept of moral injury, perhaps through a reference to the injured State's dignity, honour or prestige.

59. As to the forms of satisfaction indicated in paragraph 1, he agreed with those members of the Commission who had suggested that the reference to punitive damages was unnecessary and should be deleted. With reference to the proposed inclusion of assurances or safeguards against repetition as a form of satisfaction, he did not believe that such guarantees should be envisaged only in cases of moral injury, but might also have an important role to play in connection with wrongful acts which caused economically assessable damage. The Special Rapporteur's readiness to consider a separate article for guarantees of non-repetition was to be welcomed.

60. He also had doubts concerning the assertion in paragraph 3 that the declaration of wrongfulness of an act by a competent international tribunal might constitute in itself an appropriate form of satisfaction. While such a declaration might be an adequate form of reparation for a legal injury, satisfaction for moral injury as such would require some form of positive conduct on the part of the offending State. Lastly, he agreed with paragraph 4 of the article. In no case should satisfaction imply humiliation, nor should it, in principle, result in the violation of a State's sovereign equality or domestic jurisdiction. However, the language of the paragraph as a whole could be improved.

61. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that the large number of draft articles presented by the Special Rapporteur did not mean that work on the topic was advancing rapidly; on the contrary, the Commission had not yet settled some of the problems fundamental to the topic's further development. The Committee's task was facilitated in the present instance by the indication in paragraph 531 of two specific points on which comments were invited. Before presenting its views, his delegation wished to express its appreciation to the Special Rapporteur for his skilful handling of a most difficult topic.

(Mr. Calero Rodrigues, Brazil)

62. The first question concerned the introduction of a list of dangerous substances as a possible aid in clarifying the concept of significant risk. His delegation had not favoured a list of activities involving risk and it did not favour a list of dangerous substances. The fact that a substance included in the list was being handled did not mean that the activity in question necessarily created a risk of transboundary harm; on the other hand, such a risk might be created by activities which had no connection whatsoever with a dangerous substance. In the light of the considerations set forth in paragraph 483 of the report it seemed clear that the advantages of a list would be minimal and that the effort involved in preparing such a list would not be justified. More important would be to make sure that the rules designed to govern the obligations of States concerning activities involving substantial risk were flexible and did not place a straitjacket upon States. Particular care should be exercised with regard to procedural rules which, when spelt out in too much detail, tended to give rise to bureaucracy.

63. With regard to the second point raised by the Commission (para. 531 (b)), his delegation considered that liability of the State in the situations mentioned should not be completely excluded but might, in some instances, be considerably reduced, becoming merely residual. The main purpose was, after all, to establish rules aimed at ensuring that an innocent victim was not left to bear the loss. That purpose was to be achieved by guaranteeing compensation. Whether the compensation came from the State under whose jurisdictional control the activity causing the harm had taken place or from the operator conducting the activity was, in practical terms, of limited importance. Unlike certain international instruments dealing with specific fields in which the operator had a well-defined and primordial role, the draft under consideration was to have a general character; it therefore seemed advisable to seek an adequate balance between the obligations of the State and those of private parties which had conducted the activity causing transboundary harm. Although theoretically the State could always seek redress from the operator, it had to be borne in mind that a small country might find it difficult to deal with a large and powerful transnational corporation. On the other hand, as some members of the Commission had pointed out, it would be unfair to allow States to avoid liability by hiding behind the operators. He wondered whether a decision on the doctrinal issue involved was really essential for a satisfactory development of the articles. The theoretical basis on which the articles were being developed seemed supple enough not to preclude the introduction of articles which might in fact result in a flexible system of attribution of liability. That was the pragmatic course which the Commission should follow, leaving it to future jurists to undertake a deep doctrinal analysis.

The meeting rose at 5 p.m.

UNITED NATIONS

General Assembly

FORTY-FIFTH SESSION

Official Records

SIXTH COMMITTEE
29th meeting
held on
Friday, 2 November 1990
at 10 a.m.
New York

SUMMARY RECORD OF THE 29th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

CONTENTS

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued)

This record is subject to correction.
Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, Room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/45/SR.29
20 November 1990
ENGLISH
ORIGINAL: SPANISH

/...

The meeting was called to order at 10.30 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (*continued*) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (*continued*) (A/45/437)

1. Mr. CORELL (Sweden), speaking on behalf of the Nordic countries - Denmark, Finland, Iceland, Norway and Sweden - said that those countries attached great importance to the issue of international liability for injurious consequences arising out of acts not prohibited by international law. They were convinced that there was a growing realization of the need to draft a legal instrument in the field of international liability, most specifically with regard to transboundary environmental and ecological harm. The main cause for that harm was unsustainable patterns of production and consumption, particularly in the industrialized countries. Developments clearly demonstrated the need for appropriate global and regional legal instruments to cope with that situation. For that reason, the current work of the International Law Commission should be linked to other efforts to protect the environment and should be seen in that context. With the United Nations Conference on Environment and Development scheduled for 1992, it would be most desirable if the work of the Commission could be, if not finished, at least brought to an advanced stage so that it could be presented at that Conference.

2. The complete set of rules that had now been drafted took into account many of the comments and proposals put forward the previous year and reflected the practices that had evolved in recent years in the field of environmental protection, especially the articles on preventive measures. The Nordic countries noted that the draft articles contained elements, structures and terminology from pre-existing agreements or draft agreements. In their opinion, that approach was commendable and would certainly facilitate further discussions.

3. In addition to the primary objective of prevention and restoration, another common goal should be a general framework convention based on the need to protect the innocent victim, whatever his legal status, and to guarantee prompt and adequate compensation for damages. They understood, however, that the sights should not be set too high. In that regard, the words of the Special Rapporteur in paragraph 48 of his report (A/CN.4/428) were worth remembering.

4. They welcomed article 10 of the proposed draft articles, which reflected the principle *sic utere tuo ut alienum non laedas*. The preventive measures in the new chapter III were, in general, acceptable. With respect to article 17, it would be useful for the convention to include certain factors that States should take into account. They were somewhat hesitant about article 20 because of its mandatory language, which should be examined in greater depth.

5. There was merit in the view expressed by some members of the Commission that chapter VI should begin with a clear provision on the obligation to pay

/...

(Mr. Corell, Sweden)

compensation. In that regard, the Nordic countries welcomed article 24, which established the obligation to pay compensation for harm to the environment. However, the article raised questions as to the scope of that obligation. The criteria for compensation needed further elaboration. Also, the relationship to civil liability régimes was not clear.

6. As they had stated the previous year, the Nordic countries would like to see the relationship between State liability and civil liability clarified in the draft text. The draft articles should establish a régime for cases in which civil liability proved inadequate. That meant that the State liability established would be residual in nature. It also meant that, in the case of a civil liability régime, the injured party - whether a State, a physical person or a legal person - would be entitled to bring action before the courts of the State of origin. When the régime provided for in the draft articles was invoked, the affected State would act in its own capacity to protect itself and its territory from transboundary harm and to protect the interests of its inhabitants. However, that did not prevent private persons within that territory from taking such remedial actions as they saw fit. It was evident that damages paid under a civil liability régime would have to be deducted if damages were paid in accordance with the State liability régime. He mentioned the observations made in that connection by the representatives of Canada, Italy and Australia in their statements the previous day.

7. The foregoing brought out the question of whether the State of origin had primary liability. Some members of the Commission thought that the operator should be held liable, an approach compatible with contemporary State practice. However, reference to State practice could not be decisive in the context of the draft articles, since, as the Nordic countries had previously mentioned, those articles dealt with a new area in which the classical legal view was not applicable. The present approach was to try to protect the interests of the victim.

8. The question of global commons, which was also dealt with in principle 21 of the Stockholm Declaration of 1972, was an important and most difficult issue. It was necessary to bring its legal aspects into focus, especially in an era of creeping pollution and global warming. The Special Rapporteur had presented some of those issues in his report.

9. The Commission was seeking the views of the Sixth Committee on two specific points (A/45/10, para. 531). With respect to point (a), the five Nordic countries would prefer general objective criteria to a list of dangerous substances. If such a list were compiled, it should not be exhaustive. As for point (b), the Nordic countries had spoken in favour of a régime of State liability the previous year. In their view, it was important to establish civil liability régimes. The present trend was towards a system that would make it possible to provide adequate compensation to victims in situations in which the harm caused was of considerable magnitude and civil liability régimes would perhaps prove inadequate. For that reason, they did not think that it was necessary for the Commission to formulate rules on civil liability except so as to indicate the relationship between State liability and civil liability under the convention. Such provisions might also indicate that the State of origin should have primary liability.

/...

(Mr. Corell, Sweden)

10. According to present international practice, the operator, owner, courier, etc., was the primary subject of obligations, and States sometimes bore residual liability for amounts not covered by the private entity. However, unless a decision was reached as to whether it was possible to establish a system in which the State of origin had primary liability, the draft articles would not be very far-sighted. It should not be forgotten that private entities were often limited in their ability to pay damages, since they were dependent on the extent to which insurance companies were prepared to accept responsibility for the activities in question.

11. Mr. WINKLER (Austria), speaking on the topic of the jurisdictional immunities of States and their property (A/45/10, chap. III), said that, firstly, in response to the question of whether the draft articles should include a special provision relating to State enterprises with segregated State property, his delegation continued to believe that it should be included. It had noted with interest the new wording suggested by the Special Rapporteur, which in its view would improve the text and should be adopted by the Commission. It also welcomed the statement on the subject by the representative of Australia at a previous meeting.

12. Secondly, with respect to draft articles 12 through 28, it was surprised by the view expressed by some members of the Commission that there was a scarcity of judicial practice or evidence of State practice concerning the labour law disputes provided for in article 12. While that might have been true some 10 years ago, it was not now. Article 12 would be considerably improved if paragraphs 2 (a) and 2 (b) were deleted. His delegation also questioned the reference in paragraph 1 to "social security provisions which may be in force in that other State", which was why it supported the suggestion of the Special Rapporteur, as stated in paragraph 182 of the report of the Commission.

13. His delegation believed that it was essential to retain article 13; the arguments put forward in favour of its deletion were unfounded. Furthermore, the European Convention on State Immunity contained a similar provision. While article 16 did not pose any particular problems, his delegation still considered its inclusion unnecessary. There had been widespread support for article 17; it would, however, be preferable to delete the expression "or is controlled from" in paragraph 1 (b). A clearer criterion was provided by the two other references in that subparagraph, which were sufficient.

14. With regard to article 19 and the three issues which required clarification, his delegation preferred the expression "civil or commercial matter", to the bracketed terms in the *chapeau* of the article; it regarded as unnecessary the addition of a new subparagraph (d); and it concurred with the opinion of the Special Rapporteur (A/45/10, para. 210) that for the last part of the *chapeau*, the formula used in the European Convention on State Immunity was preferable, given its broader scope.

15. In the view of his delegation, article 20 should be deleted. Measures of nationalization, as sovereign acts, were sovereign acts not subject to the

/...

(Mr. Winkler, Austria)

jurisdiction of the courts of another State, and could not be considered as representing an exception to the principle of State immunity. As for part IV of the draft, the criterion adopted by the Special Rapporteur seemed reasonable, and the amendments which he had suggested represented improvements to the text. It would be sensible to merge the original texts of draft articles 21 and 22 and also to delete the phrase "or property in which it has a legally protected interest". So far as article 24 was concerned, Austria remained opposed to the hierarchy of the various forms of service of process. The competent court should be free to choose the most suitable procedure for each particular case. His delegation also continued to have doubts regarding the transmission of documents by mail to the head of the Ministry of Foreign Affairs, since, in the case of transmission through diplomatic channels, it would be sufficient to address the relevant documents to the Ministry. Finally, his delegation favoured the deletion of the words "if necessary" from paragraph 3.

16. Austria had no difficulties in accepting the Special Rapporteur's proposed addition to paragraph 1 of draft article 25 (A/45/10, para. 232). The Austrian courts were obliged to inquire ex officio into the question of jurisdiction. With regard to article 27, its provisions still did not clearly stipulate the obligation of the foreign State to assume the judicial costs, which would be the necessary corollary of the exemption from the requirement to provide any security, bond or deposit.

17. In conclusion, he expressed his delegation's satisfaction with the approach taken by the Commission and reaffirmed his hope that the rules of international law relating to State immunity which the Commission was elaborating would substantially facilitate international trade relations.

18. Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic) said that the growing interest shown by countries, including his own, in international liability for injurious consequences arising out of acts not prohibited by international law reflected the desire to build a new world based on law and order in which people could live in peace and harmony. In addition to placing a juridical obligation on States to answer for their own actions, the term "liability" meant both that there was an objective necessity for States to act in a responsible manner, in accordance with international law, and that they must be capable of such action.

19. In the view of his delegation, States had successfully combined their efforts on numerous occasions. To be sure, it was impossible for States to cope in isolation with the consequences of disasters like that of the Chernobyl nuclear power plant, and for that reason he trusted that States would show good will when considering the draft resolution to be introduced by the Byelorussian and other delegations during the forty-fifth session. In his delegation's opinion, if the concept of liability for acts not prohibited by international law was based on that of activities involving risk, it would eventually be possible to resolve the question of objective liability arising from lawful actions, to clarify the scope of the draft articles under consideration, to distinguish between that concept and the concept of the liability of States that failed to fulfil their international

/...

(Mr. Astapenko, Byelorussian SSR)

obligations in good faith and to create conditions conducive to its universal acceptance. To that end, it would be helpful to compile a list of dangerous substances, since that may give more precise meaning to the concept of "significant risk". He compared that concept with the notion of "harm" and agreed with those members of the Commission who had favoured assigning to it the epithet "significant", rather than "appreciable".

20. Byelorussia believed that articles 21, 22 and 23 were consistent with the concept of objective liability. In the case of article 23, however, he proposed that the words "to share certain costs among the States concerned" should be replaced by the words "to take into account the costs borne by the State of origin with respect to an activity referred to in article 1".

21. So far as the wording of article 25 was concerned, he considered alternative B more realistic. While a case of joint liability could be imagined in theory, it was precisely in such cases that the countries concerned could resolve the problem by applying the framework agreement, with due regard for the specific circumstances, and for the purposes of the draft articles it was necessary to apply the principle of separate liability of subjects.

22. The Byelorussian SSR advocated introducing the notion of "liability of the operator", since, in order to ensure the effective and uniform implementation of the provisions of the draft articles, it was necessary to take into account not only the activities of States which had injurious consequences, but also those of the operator.

23. Mr. AL-BAHARNA (Bahrain) agreed with the Special Rapporteur that the activities involving harm and those involving risks had more similarities than differences, rendering it preferable to consider them in conjunction. He urged the Commission not to limit the scope of the topic, and to ensure the formulation of effective regulations covering the transboundary activities which caused "injury" or "harm".

24. Bahrain agreed that a global convention should list, not activities, but substances which were inherently dangerous. The problem was the manner in which such a list was to be formulated. He believed that the topic was too important to be covered by the general provision on the use of terms, and that consideration should be given to the possibility of an additional article which would include the relevant information.

25. His delegation supported the idea of extending the definition of "transboundary harm" to include the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1. On the other hand, Bahrain did not accept the definition of "appreciable harm" in article 2 (h), because it could not be determined precisely at what point harm ceased to be a mere nuisance or which category of harm was considered insignificant.

/...

(Mr. Al-Baharna, Bahrain)

26. With regard to the new article 10 proposed by the Special Rapporteur, he was not convinced that it would be acceptable; the Commission should reflect further on the viability of provisions covering non-discrimination.

27. Turning to the procedural provisions, he said that Bahrain welcomed articles 11 and 12, and in particular the idea that the relevant international organizations should participate in the work of assessing transboundary harm, although it regarded as unfortunate the use of the term "intervenes" in article 12. Article 12 apparently contained an error, and the words "of the preceding article" should read "of article 11". Bahrain agreed with articles 14 and 15 but felt that article 16 was both excessively complex and unnecessary. If the Commission considered its retention essential, it should perhaps indicate the different functions and objects of articles 8 and 16, which both referred to preventive measures. Although the factors enumerated in the new article 17 could merely serve as guidelines, there was no reason why they should not be included in the draft articles since they assisted the States concerned in monitoring the pernicious effects of transboundary harm.

28. He believed that article 18 should be revised, since, in its current form, it considerably reduced the obligation of prevention established by article 8. With regard to article 19, his delegation doubted whether non-reply by the notified State should amount to acquiescence in the measures, and he also suggested that the words "a period of six months" be replaced by the words "a reasonable time". In article 20, he suggested that the phrase "or cannot be adequately compensated" should be deleted.

29. Some of the provisions of the new chapters IV and V, which constituted the core of the topic, were controversial. Of course, article 21 was wanting in form and substance and the words "in principle" weakened the obligation to pay compensation. It was open to argument whether the principle contained in article 23 should be limited to claims made through diplomatic channels. If the purpose was to reduce the amount of compensation in certain circumstances, it would be better to make the rule applicable to claims made through diplomatic channels or by other means. His delegation would also prefer the part of the text in brackets to be omitted and its content explained in the commentary to article 23.

30. In article 24, the requirement that the claim should be made through the diplomatic channel was unreasonable because a right did not depend upon the means by which it was pursued, whether by diplomatic claims or by other means. His delegation suggested the deletion of subparagraph (c) of article 24.

31. In Bahrain's view, the new articles 28 to 33 were probably the most controversial. The basic idea was to enable States or individuals who had been victims of transboundary harm to have unrestricted access to the courts of the State of origin. Although his delegation would like to give effect to the principle that the State of origin should give its national courts jurisdiction in matters concerning transnational risk and harm, it doubted whether that was practicable. It was possible that, in general terms, the provisions of article 29

(Mr. Al-Baharna, Bahrain)

might not be acceptable in a universal instrument. In any event, the Commission should re-examine the question of access to the courts of the State of origin by nationals of the affected State in the light of developments in international law, especially concerning the environment. His delegation reserved for the present its comments on article 32 because it wished to study its implications in depth.

32. Bahrain approved in principle the idea of defining the scope of the topic by reference to substances which were inherently dangerous, provided that some thought was given to the possibility that some of the Special Rapporteur's proposals should be introduced as independent articles. It agreed that the State of origin should be held liable for transboundary risk or harm, but a way would have to be found to make the private party or operator responsible for his actions.

33. Mr. GODET (Switzerland) said that with regard to the topic of State responsibility the Commission should refer to pages 1 to 5 of the written report which his delegation had submitted and that its statement would be limited to the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

34. The sixth report of the Special Rapporteur (A/CN.4/428) and the Commission's report (A/45/10) dealt extensively with the question of whether activities involving risk and activities with harmful effects should be treated separately. The Special Rapporteur and most of the members of the Commission thought that both kinds of activity had more aspects in common than distinguishing features, so that it was preferable for their consequences to be examined in a similar manner under a single régime. His delegation shared that view and was even prepared to regard activities with harmful effects as activities involving risk, for both kinds of activity contained a risk of causing transboundary harm.

35. In the case of activities involving risk, preventive measures should be taken both to prevent an accident occurring and to contain or reduce the effects of an accident which had already occurred. In the case of activities with harmful effects, suitable measures should likewise be taken both to prevent the production of the harmful effects and to limit or mitigate them once they had been produced.

36. When, despite the preventive measures, transboundary harm of a certain magnitude ("important" or "substantial") was caused, the damage must be made good regardless of the type of activity from which it had resulted.

37. As to the question of whether it would be useful to clarify the concept of appreciable risk by establishing a list of dangerous substances, his delegation had already come out, in its 1988 statement, in favour of the establishment of a list of activities involving risk which entailed the obligation to pay compensation in the event of transboundary harm. It therefore supported the idea underlying the work on civil liability for dangerous activities carried out by the Committee of Experts for the European Committee on Legal Co-operation of the Council of Europe. The list should be illustrative rather than exhaustive and leave room for reasonable analogy, for it would thus be possible to include in the scope of the

/...

(Mr. Godet, Switzerland)

convention activities which were regarded as dangerous although they did not appear in the list. The list should take the form of an annex to the convention and be accompanied by a suitable review mechanism.

38. The Swiss delegation noted with satisfaction that the draft articles proposed by the Special Rapporteur envisaged the extension of the concept of transboundary harm to cover harm to the environment. It also thought that, with regard to the cost of preventive measures, it should be made clear that account would be taken only of the cost of the measures actually needed to reduce or limit the harm.

39. According to the Special Rapporteur, the basic idea of the provisions on liability was to assign to the State of origin a primary obligation to pay compensation and to negotiate concerning the form of the compensation. His delegation supported the idea of establishing a régime of international liability based essentially on the existence of transboundary harm resulting from a dangerous activity. However, he thought that such a régime of causal (or objective) liability should not assign to the State of origin a primary obligation to compensate but only a subsidiary obligation, since the obligation to pay compensation for the harm rested primarily with the perpetrator of the harm.

40. It was not politically realistic to provide that the State of origin should bear primary responsibility for compensation for harm resulting from a dangerous activity on the sole ground that the risk involved in that activity had materialized and harm had been caused.

41. The Swiss delegation thought that the obligation to negotiate the compensation had no raison d'être except when the State of origin had a primary obligation to compensate. The obligation to determine the compensation by negotiation did not arise in the case of a merely subsidiary liability of the State of origin for the transboundary harm caused by dangerous activities carried out by individuals. In such a case, the liability of the State of origin arose only when the perpetrator of the harm was not able to fulfil his obligation to compensate.

42. The CHAIRMAN announced that Afghanistan had become a sponsor of draft resolution A/C.6/45/L.3.

The meeting rose at 11.45 a.m.

UNITED NATIONS
General Assembly
FORTY-FIFTH SESSION
Official Records

SIXTH COMMITTEE
30th meeting
held on
Monday, 5 November 1990
at 3 p.m.
New York

SUMMARY RECORD OF THE 30th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

CONTENTS

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (*continued*)

State responsibility; international liability for injurious consequences arising out of acts not prohibited by international law (*continued*)

This record is subject to correction.
Corrections should be sent under the signature of a member of the delegation concerned
within one week of the date of publication to the Chief of the Official Records Editing Section, Room DC2-750,
2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/45/SR.30
26 November 1990
ENGLISH
ORIGINAL: FRENCH

/...

The meeting was called to order at 3.15 p.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10)

State responsibility; international liability for injurious consequences arising out of acts not prohibited by international law (continued)

1. Mr. LEHMANN (Denmark), speaking on behalf of the Nordic countries, said that the primary norms governing the conduct of States, as well as the tertiary or procedural rules concerning the settlement of disputes between States, were amply codified in numerous treaties and other international instruments, so that what remained to be codified were the second international norms stating the conditions which had to be fulfilled in order to establish the responsibility of a State in international relations and the legal consequences which flowed from an established wrongful act. The difficulty of the undertaking reflected the well-known fact that to formulate and adopt the primary rules was one thing and to spell out the responsibility, with all that it entailed, of States violating those primary rules was quite another. A further difficulty was the need to avoid re-drafting the primary rules.

2. The Nordic countries welcomed the fact that the Commission had finally been able to steer the right course in dealing with the central remaining topic in the building of an international legal order, and urged the Commission to finalize the topic before the end of the Decade of International Law. As international co-operation expanded, many activities on the part of States entailed the need to determine responsibility in the event of a wrongful act. The Commission itself was currently dealing with several topics which had a bearing on the concept of State responsibility - the draft Code of crimes against the peace and security of mankind, the international watercourses topic, and liability for injurious consequences arising out of acts not prohibited by international law. An international convention codifiying the general norms on State responsibility and its consequences would solve many problems of co-operation among States. In that connection, he expressed regret that the Commission had often failed to provide a clearer survey of its work on the topic, especially in years when a report from the Special Rapporteur had not been forthcoming or had not been considered owing to lack of time. In line with their wish to see the finalization of the topic well before the end of the century, the Nordic countries urged the Commission to present at an early date a brief outline of the results so far achieved together with an indication of what remained to be done and the time period within which the project might be finished.

3. Turning to the Special Rapporteur's second report (A/CN.4/425 and Corr.1 (English only) and A/CN.4/425/Add.1 and Corr.1 (English only)), he said that the Nordic countries supported, in general terms, the structure adopted for that part of the project. In particular, it found reasonable the Special Rapporteur's approach of including at that stage the element of fault in the evaluation of the faults and degrees of reparation due by the offending State. Apart from the fact

that even delicts might present different degrees of gravity, it had to be remembered that the project also covered crimes and that the concept of fault was an indispensable part of the evaluation of any international crime committed by a State through its agents or other competent authorities. In that line of reasoning, the Nordic countries also supported the Special Rapporteur's arguments in favour of including the element of punitive damages as well as of safeguards of non-repetition among the consequences of an internationally wrongful act.

4. Lastly, the Nordic countries regarded the carefully balanced nature of the project as a factor which might help in reaching agreement on a basic and comprehensive text which would cover the topic of general international law, still awaiting codification.

5. Mr. PUISSOCHET (France), speaking on the topic of State responsibility, said that international responsibility presupposed an unlawful act attributable to a State and leading to damage or loss. That was why, unlike article 1 of the draft adopted by the Commission on first reading in 1973, the articles it was considering at present, which linked reparation with the concept of injury as an essential pre-condition for international responsibility, enjoyed the support of his delegation.

6. With regard to the nature of the injury giving rise to reparation, his delegation agreed with the Special Rapporteur and most memebers of the Commission (para. 328) in thinking that damage suffered by a State as a result of a wrongful act could broadly be divided into the two categories of "material" and "non-material" or "moral" damage. As regards non-material damage, the question of the advisability of referring to "legal injury" was raised (para. 399) in connection with article 10 (footnote 263). While the existence of such a thing as legal injury could not be denied, the question arose whether, if it were specifically referred to in that context, it should not also logically appear in articles 7 and 8. In fact, the reference to "legal" injury was justified only where violation of the law did not in itself constitute such injury; and, moreover, the breach had to have entailed damage to a particular State.

7. In paragraph 401 of the report, the Special Rapporteur replied to members of the Commission who considered that article 8, paragraph 1 did not seem to cover the position of States not directly or not materially injured by a violation of rules concerning human rights or the environment by stating that "it was precisely in the language of paragraph 1 of article 10 that such injured States could find the basis to claim remedy". While agreeing with the Special Rapporteur that the applicable human rights provisions, given the fundamental importance of the principles involved and the very special nature of the commitments undertaken, had extended the range of potentially affected States and that the question of legal injury had to be considered very carefully from that viewpoint, he felt that in the case in point it would be preferable not to use language which, appropriate though it might be in the context of human rights or the environment, would not necessarily be so in other fields.

/...

(Mr. Puissochet, France)

8. In the opinion of his delegation, international State responsibility was not a penal responsibility. That was the reason why it could not approve the introduction of the concept of international crimes attributable to States in article 19 of Part One of the draft. For the same reason, without casting doubt upon the fact that satisfaction, or even the obligation to make reparation imposed by international law upon the State responsible for the unlawful act, might to some extent be in the nature of a punishment of that State, it would prefer paragraph 1 or article 10 not to contain terms suggestive of the vocabulary of criminal law, such as "punitive damages". It was to be hoped that the Special Rapporteur would be able to reconcile the different doctrinal approaches to that subject.

9. His delegation endorsed the basic principle to the effect that the incurring of international responsibility entailed an obligation to remedy the damage caused. It also shared the Special Rapporteur's view that the cessation of an international wrongful act was not, strictly speaking, a form of reparation. The possible modes of reparation were restitution in kind, pecuniary compensation and satisfaction, the latter two being forms of reparation by equivalent. In that connection, he welcomed the Special Rapporteur's decision to entitle article 8 "Pecuniary compensation" rather than "Reparation by equivalent".

10. The Special Rapporteur was entirely right in saying that pecuniary compensation was the main form of reparation of economically assessable damage, whether material or moral, while satisfaction was the appropriate form of reparation of moral damage which was not economically assessable. The theory underlying that formulation appeared to correspond to the traditional distinction drawn between satisfaction, the form of reparation best suited to moral injury suffered by States, and pecuniary compensation, which was more suitable to material or moral damage suffered by the injured State's nationals.

11. Commenting more specifically on some of the articles considered by the Commission, he noted with regard to article 8 (footnote 247) that it would not be possible, and indeed was not desirable, to spell out in too much detail the rules governing pecuniary compensation. However, the Commission was entrusted with the progressive development as well as the codification of international law, and there would therefore be no objection in principle to its trying to fill any gaps it might find in studying the subject by proposing solutions acceptable to States. Whether that could be done in connection with the point under consideration was, however, doubtful bearing in mind the importance of the facts in each particular case and the need to leave the necessary latitude to the judge in reaching his decision.

12. While his delegation endorsed the idea underlying both alternative versions of paragraph 1 of article 8, it felt that from a drafting point of view it might be useful to specify the scope of application of the article, which did not become fully apparent until paragraph 2 ("economically assessable damage"). Although it agreed with the Special Rapporteur that the two alternatives were equivalent in substance (para. 357), it preferred alternative (b); version (a) had the drawback of seeming to say that the object of pecuniary compensation was to re-establish the

/...

(Mr. Puissochet, France)

situation that would exist if the wrongful act had not been committed, whereas in fact pecuniary compensation was resorted to where such re-establishment of the situation was not possible.

13. With regard to article 8, paragraph 2, his delegation, for reasons which included those given in paragraph 365 of the report - in particular the need not to neglect an element closely connected with the respect for human rights - would, like the Special Rapporteur, be in favour of retaining the proposed reference.

14. As for paragraph 3, concerning *lucrum cessans*, his delegation pointed to the difficulty in establishing that aspect of damage when an intermediate act, itself deriving from the initial act, had affected the injured State. It considered the rule laid down acceptable *a priori* since the necessary causal link with the wrongful act which gave rise to the damage was evident.

15. With respect specifically to the causal link between the internationally wrongful act and the damage, the wording of article 8, paragraph 4, might benefit from being made more precise. Admittedly, the basic intention was to provide a guideline which could be adapted to each specific case depending on the particular circumstances, but it would be useful to reflect the idea that, for there to be compensation, the causality must be certain and exclusive.

16. Article 9 concerning interest (footnote 262) was too detailed and established excessively rigid rules where there was no established practice. If, when they decided on compensation, international tribunals determined the date and modalities of payment, they were free to break up the obligations by establishing interest separately or by not doing so. It would therefore be preferable to omit article 9, even if it meant introducing a general formula covering the matter in article 8.

17. As for article 10 concerning satisfaction (footnote 263), paragraph 1 should be reworded to show that the list of forms of satisfaction it included was not exhaustive. As for whether guarantees of non-repetition really constituted a form of satisfaction, his delegation, while noting that it was for the injured State or the judge who might be assigned to the case to determine, depending on the circumstances of the case, whether a guarantee of non-repetition consituted adequate satisfaction, awaited with interest the separate article which the Special Rapporteur was considering preparing on that subject (para. 403).

18. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that he doubted whether it was possible, in the current state of international law and given the variety of situations, to codify the liability of States for lawful acts. Even an attempt to develop the law would seem to be very ambitious. In any case, it was by no means certain that it could be done successfully until the work on international liability for wrongful acts had been completed.

19. However, it appeared that the draft articles proposed by the Special Rapporteur in reality contained two distinct sets of proposals: on the one hand, a

/...

(Mr. Puissochet, France)

kind of code of good conduct for activities that might or did cause transboundary harm (arts. 6 and 7 and chap. III of the draft articles) and, on the other, rules governing liability in the event of harm (art. 9 and chaps. IV and V of the draft articles). It was hard to say whether the former provisions fell strictly within the scope of the study in question. They defined rules governing activities that might have transboundary effects, but that, in fact, had nothing to do with the problem of liability envisaged in the draft articles. Those rules would have no direct relationship with the problem of liability unless the intention was to establish that their non-observance involved the international liability of the State of origin. That would then involve liability for wrongful acts. If the Commission still wished to continue its consideration of the behavioural obligations that States must respect in territory in which activities that might involve transboundary harm were carried out, perhaps it should make a clear distinction between the two parts of the study.

20. As for the Commission's declared intention to prepare a draft convention in that field, his delegation felt that that was a risky approach because many States were not prepared to accept the rules of liability envisaged except for carefully defined activities or for a specific geographical area, since their obligations were defined on a case-by-case basis depending on the special problems posed by those activities or by the physical characteristics of the space in which they were carried out. The same applied to the rules for prevention and consultation envisaged by the Commission, which had again gone too far for what was supposed to be a general text.

21. The Special Rapporteur intended to limit the scope of the draft articles by clarifying the notion of risk through the preparation, with the help of experts, of a list of dangerous substances, in other words, substances that created a significant risk of harm to persons, property or the environment. His delegation was prepared to endorse that approach because it saw it as a step towards a precise definition of cases in which liability for risk would be conceivable. The reference to substances would appear *a priori* to allow for greater precision than the reference to "activities". The question might arise as to whether the list envisaged was a genuine response to the problem of determining the scope of the draft articles *ratione materiae*. In any case, that step did not *a priori* appear sufficient to persuade anyone that the text prepared could take the form of a convention.

22. Firstly, in the preparation of the list, the same difficulties would be encountered as in the case of a list of activities. In addition to the difficulty posed by the very preparation of the list, it was uncertain that it would be sufficient. The choice of substances selected could not be made on the basis of exclusively technical criteria. States still had to agree on the selection and on the fact that the problems that those substances might cause should be solved within the framework of the draft articles and not in another technical context or in a regional context. Consultation with States would therefore seem to be indispensable in any case.

(Mr. Puissochet, France)

23. Secondly, if it was conceded that an initial version could be prepared, the list might rapidly become outdated. While an updating might be theoretically possible, it could cause even more practical difficulties since the draft would deal presumably with extremely heterogeneous categories of substances. One could well imagine an endless stream of proposals for amendments.

24. Lastly and most importantly, if the Commission tried to establish specifically to which activities or substances its draft applied, and if a fortiori it planned to give it the form of a convention, there would be a "shift" in the subject-matter. The result of following the current orientation would be draft articles on the prevention of harm deriving from specifically indicated activities and on the liability resulting therefrom. That would mean a shift from a study parallel to the study on liability for wrongful acts to a text of limited scope designed to be operational. The question was whether such an orientation would be precisely in keeping with the current mandate of the Commission and whether there was not a risk of duplication with work done in other bodies. If the Commission decided to prepare a list of dangerous substances, that list should in any case have only reference value for the States that wished to prepare a convention on a specific category of substances included in the list. In short, his delegation's view was that the rules which the Commission had undertaken to prepare should apply only to activities which posed an exceptional risk.

25. With regard to whether and to what extent the draft draft articles should provide for the liability of the State of origin for transboundary harm caused by the activities covered by the subject and carried out under the jurisdiction or control of that State when such activities were conducted by individuals, his delegation took the view that, in accordance with the solutions adopted by the conventions in force in the area of liability, primary liability resided with the operator. State liability was only subsidiary, as in the case of the convention on the liability of the operators of nuclear-powered ships, when the State failed to fulfil its supervisory obligation. There were few cases in which the State could be held directly liable. For that same reason, his delegation did not consider it possible to produce the text of a convention of a general nature that was not limited to carefully delineated hypotheses of activities representing an exceptional risk. Furthermore, the exceptions to the principle of the primary liability of the operator should be envisaged only in well-defined areas where such a solution appeared acceptable and appropriate on a case-by-case basis.

26. The Special Rapporteur had asked whether he should consider activities involving risk and activities with harmful effects separately. In the view of his delegation, the subject should be restricted to activities involving risk, or even activities involving an exceptional risk. Moreover, it wondered whether it was logical to classify measures that might have to be taken to limit the harm caused by an activity that had not appeared to be intrinsically dangerous as prevention.

27. In conclusion, his delegation reaffirmed that the subject of liability for non-wrongful acts could not yet be forced into a rigid framework of unambiguous and pre-established rules, such as those that might be envisaged with regard to

/...

(Mr. Puissochet, France)

liability for wrongful acts. On the other hand, the Commission would do useful work by offering States a choice from among various solutions that would enable them, when necessary, to deal with a given problem.

28. Mr. HANAFI (Egypt) said that in view of the complexity of the question of State responsibility, it was important to avoid establishing rigid and unnecessarily detailed rules to be applied mechanically, regardless of the situation. In that connection, it was always necessary to take into account the circumstances of the developing countries, whether the effort to codify and develop the law concerned State responsibility or another aspect of international law.

29. With regard to State responsibility (chap. V of the report), the Commission's task was not merely one of codification. When an examination of the jurisprudence, customs and established practice showed that the rules in force in that area contained lacunae, the Commission must work to fill them. The purpose of reparations was to eliminate all the consequences arising from the wrongful act and to compensate for the loss that had not been made good by restitution in kind. Thus a link existed between the various modes of reparation.

30. Article 8 (footnote 247) dealt primarily with compensation, and its heading should be amended accordingly. In paragraph 1, two questions remained to be settled: when the evaluation of damage would take place and what final deadline should be set. In that context, his delegation agreed with the Special Rapporteur that the contents of the paragraph might be considered at the same time as the draft articles in Chapter Three. Although the two alternative texts of paragraph 1 were somewhat ambiguous, alternative (a) could be retained if it was worded more clearly and if its clauses were simplified.

31. While not opposed to the use of the expression "economically assessable damage" in paragraph 2, his delegation considered that it should be made more explicit and should be given a practical content by introducing general criteria into the text or at least by stipulating that the damage was economically assessable according to the principles and rules in force. The concept of "moral damage" should appear in another part of the draft articles, since it did not relate to economically assessable damage.

32. In article 8, paragraph 3, the reference to profits lost was too vague. It should be stated that compensation included profits the loss of which could be accurately assessed, was foreseeable and would not have been sustained if the wrongful act had not been committed. With regard to the uninterrupted causal link between the wrongful act and the loss, there must be full compensation for losses where the wrongful act was the immediate and exclusive cause, as well as for losses where the wrongful act was the exclusive cause, even if they were not connected with the said act immediately but through a series of events, each of which was connected with the other exclusively by a causal link.

33. There was a danger that the concept of "causal link" (para. 4) might confer upon the State an unlimited responsibility, which would run contrary to the principles laid down by the Special Rapporteur in his report and to the customary

/...

(Mr. Hanafi, Egypt)

rules in force and established practice in that area. His delegation therefore proposed that the norms referred to by the Rapporteur should be included in the text of paragraph 4. Lastly, his delegation was satisfied with the general orientation of paragraph 5, but felt it would be preferable to make it the subject of a separate article so as to make it a general rule that applied to all other forms of reparation.

34. With regard to article 9 (footnote 262), he pointed out that in jurisprudence and established practice interest was considered to be part of reparation. It was therefore important to provide expressly for the obligation to pay interest in order to ensure full reparation for the damage arising from the wrongful act. There were, however, differences of opinion regarding the dates from which and until which interest should run, and the rate of such interest. Logically, interest ran from the date of the decision until the payment of the reparation. The rate should be set according to each situation, taking into account the level of economic development of the country concerned. Those questions were generally left to the judgement of the judicial courts or arbitral tribunals. The Commission should study the question further before taking a definitive decision; it could also decide to delete paragraph 2, as the majority of the Commission's members had suggested.

35. On the whole, article 10 on satisfaction and guarantees of non-repetition (footnote 263) raised no difficulties, but his delegation had doubts about the usefulness of the concept of "legal injury" in paragraph 1. As the Special Rapporteur had point out, that concept applied whenever there was a wrongful act, and for that reason, his delegation supported the proposal that it should be deleted.

36. The question of the impact of fault on the forms and degrees of reparation raised difficult questions to which the Commission should devote an in-depth study in the near future.

37. Mr. VIO GROSSI (Chile), referring to chapter III of the Comission's report (A/45/10) on "Jurisdictional immunities of States and their property", suggested that it should be entitled "Restrictions on the immunity of States", but said he was open to other proposals. With regard to article 12 (footnote 79), he agreed with other delegations that the phrase "and is covered by the social security provisions which may be in force in that other State", at the end of paragraph 1 should be deleted. Subparagraph (a) of paragraph 2 should also be deleted; as to subparagraph (b), his delegation supported the solution suggested in paragraph 182 of the report.

38. The restriction of the jurisdictional immunity of the State set forth in article 13 (footnote 85) was particularly important for Chile, which had not forgotten the assassination of the former Minister, Orlando Letellier, in Washington in 1976. It was therefore essential to avoid anything that might lend itself to controversy; that could not be said for the phrase "... if the act or omission which is alleged to be attributable to the State", which did not make clear the need for a link between the person responsible for the act or omission and the defending State.

/...

(Mr. Vio Grossi, Chile)

39. His delegation agreed with the Special Rapporteur and with the majority of members of the Commission in favouring the deletion of article 20 (footnote 96), as measures of nationalization were sovereign acts. It was also in favour of merging articles 21 and 22 (footnote 97) and retaining, in paragraph 1 (c) of the new article 21, the phrase "[and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed]" and, in paragraph 2, the idea that the property covered by paragraph 1 could not be subjected to any measures of constraint. It supported the deletion of article 23 (ibid.), but the Commission should await the final results of its work concerning the definition of "State" in article 2 and the ultimate fate of article 11 bis.

40. As certain members of the Commission had proposed, article 24, paragraph 3, should be replaced by the following text: "The document should be made available in a language acceptable to the State concerned", and the new version of subparagraphs (a) and (b) of paragraph 1 proposed by the Special Rapporteur (para. 229) should be accepted.

41. Moving on to chapter IV, "The law of the non-navigational uses of international watercourses", he said that article 24 (footnote 120), which, like article 25, had as its underlying principle the idea of optimum utilization, seemed well balanced. Account should be taken, however, of the obligation not to cause appreciable harm set forth in article 8. In article 24, paragraph 2, the notion of conflict should be replaced by that of the incompatibility of several uses.

42. With regard to paragraph 1 of article 25 (footnote 122), it should be assumed that watercourse States were obliged to co-operate in the regulation of watercourses, and not only to co-operate "in identifying needs and opportunities for regulation". In paragraph 2, it should be specified that watercourse States were obliged to participate not only in the construction and maintenance of regulation works, but also in their improvement or modernization.

43. With regard to article [26] (footnote 123), his delegation also believed in the need for the rational management and optimal utilization of international watercourses. For that reason, improvement should be made to the substance and form of that article. In Chile's view, the important point was not to create a joint organization, but to provide for joint management, which could take on different forms and involve companies or enterprises of private law.

44. Article [27] (footnote 124) should stipulate the obligation of each State to ensure the protection of water resources and related installations, facilities and other works, in accordance with the principle of territorial integrity and that of sovereignty.

45. Article [28] (ibid.) should comprise two paragraphs, one relating to peaceful uses and the other to uses in time of armed conflict. It was essential to revise its text, however, lest, in some unforeseen way, the existing rules of international law governing that field were affected.

/...

(Mr. Vio Grossi, Chile)

46. In annex I "Implementation of the draft articles", articles 6, 7 and 8 should be deleted. The annex should in general be revised, because the civil liability régime which it stipulated for the compensation of individuals went beyond the limits of a framework agreement in so far as it could require changes in national legislation.

47. Chapter VII of the report dealt with International liability for injurious consequences arising out of acts not prohibited by international law, a principle which had not been accepted without opposition, since it ran counter to the idea that States had only to account to themselves for their actions, and aimed at preventing certain acts involving special risks and, where those acts could not be prevented, at organizing reparation for the damage which they had caused. That approach was broadly reflected in the Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972), and specifically in its principles 21, 22 and 26.

48. Chile fully agreed with the general principles set forth in the draft articles, but was still concerned about the liability incurred by States for harm arising out of acts not prohibited by international law, and in particular nuclear activities. With regard to the transboundary harm which could be caused by the dumping of nuclear waste, it was necessary to ascertain whether that harm could still be felt after a long period of time. It was also necessary to stipulate, as in article 1, not only the harm caused by certain activities but also the risk which they created of causing such harm, thereby facilitating the taking of preventive measures. In article 2 (a), mention should be made of the use of elements of nature and of the environment where that use could cause transboundary harm, such as the use of geological faults as a dumping space for nuclear waste.

49. With regard to article 11, his delegation believed that the notification should be addressed simultaneously to all the States parties to the Convention and that their co-operation was essential. Article 16 was concerned with a particular application of the general duty of care and of the provisions of article 8. The unilateral preventive measures which the State of origin was required to take under article 1 were insufficiently rigorous and that provision should therefore be studied in more depth.

50. In response to subparagraph (b) of paragraph 531, his delegation believed that the concept of international liability for injurious consequences arising out of acts not prohibited by international law had replaced the juridical criterion of subjective fault by that of objective fault. In the event of harm, therefore, the State under whose jurisdiction or control the activity causing the harm had been carried out must report that harm, without affecting the question of culpability. The State was responsible for taking the necessary safety measures to prevent the possible harm entailed by certain activities. That responsibility was the quid pro quo of a State's sovereignty. When those activities were carried out by individuals, the liability of the State was incurred if it had not taken the necessary measures to prevent the occurrence of transboundary harm or if it had not exercised sufficient control over those activities. The issue was one of great importance and the frequency of transboundary harm was evidence of a "gap" in international law.

/...

51. Mr. LIAO Jincheng (China) said that the issue of the liability of States was extremely complex and the first part of his statement would be devoted to it. Paragraph 336 of the report under consideration had stated that the Special Rapporteur had approached remedies primarily from the point of view of injuries to aliens in cases of torts and, in paragraph 338, that the report of the Special Rapporteur had covered too many old cases, particularly of arbitral awards made in the late nineteenth or early twentieth century, during the colonial era. China believed that one of the great successes of the International Law Commission had been its ability, year after year, to transcend the limitations of traditional international law, which restricted the liability of States to attempts on the life and the property of aliens, and to include under that heading all internationally illicit acts. The Special Rapporteur had deviated from the concept of the liability of States adopted by the Commission. Paragraph 338 had also stated that certain members had mentioned the Boxer revolt as a case which should not be invoked as precedent illustrating the juridical consequences of the liability of States. The Chinese people regarded the Boxer revolt as an instance of aggression against China and of armed imperialist intervention. His delegation therefore believed that the Commission should not base its work exclusively on the liability of States with regard to the protection of aliens, and still less on cases of diplomatic protection of the imperialist type such as was accorded to aliens in the late nineteenth and early twentieth centuries.

52. With regard to article 8 (footnote 247), he shared the view of certain members that its title should be "pecuniary compensation", since the title "reparation by equivalence" could be taken to mean that such reparation was equivalent to pecuniary compensation, something that had still to be established. The article was hardly acceptable, since it formulated abstract rules based on the assumption of the equality of States, while the relations between States were fundamentally unequal. The pecuniary compensation provided for in the article reflected the point of view of the developed countries. When applied to claims for reparation made by the developing countries, it would have unfair consequences for those countries by depriving them of their right to development and thereby causing instability in international relations. As formulated, article 8 was an anachronism and not conducive to the progress of international law. Article 9 (footnote 262) should be deleted, because it covered matters that should be covered by article 8.

53. Concerning article 10 (footnote 263), his delegation saw in "satisfaction" a way of compensation and in "guarantees of non-repetition" a form of "satisfaction". It was a special form of compensation for moral injury done to a State, including damage to its dignity, honour or prestige. Concerning "legal injury" his delegation agreed with the opinion of certain members of the International Law Commission (para. 399) that the concept should be limited; otherwise the approach adopted would be unreasonable. Furthermore, the word "punitive" in paragraph 1 should be deleted, because giving a punitive character to "satisfaction" ran counter to the principle of sovereign equality among States. Moreover, the effect of fault on the means and degrees of compensation was a complex question which required further study. The Special Rapporteur had acknowledged that fault had not played an important role in that point of view.

/...

54. Turning next to "international liability for injurious consequences arising out of acts not prohibited by international law", he wondered first about the scope of the subject. In his opinion, the draft articles should apply not only to activities involving risk of causing transboundary harm, but also to activities actually causing such harm. The Special Rapporteur preferred to treat those two items together, but that type of presentation must not give the impression that it narrowed the scope of the subject. Doubts over the combined approach raised by some members of the International Law Commission must be taken seriously. Indeed, in accordance with the Special Rapporteur's definition in draft article 2, paragraph 2 (f), (footnote 305) of "activities with harmful effects", activities causing harm were those in which harm was seen from the beginning as an inevitable consequence and which could be undertaken on the basis of the adoption of measures to reduce harm and compensate for harm that had already occurred. That definition excluded from the topic activities which caused harm although they appeared not to present a risk. That ran counter to the previous position of the Commission and to the majority opinion of Sixth Committee members.

55. With respect to the advisability of drawing up a list of activities, the Special Rapporteur found that solution inappropriate for a global convention and would prefer a list of dangerous substances which would be more flexible and would have the advantage of more clearly defining the field of application for the articles. His delegation favoured the second solution, on the condition that the list of substances was indicative rather than exhaustive. Otherwise, the draft would take the form of a specific convention on specific activities and would be overtly restrictive.

56. The Special Rapporteur had proposed some revisions in draft articles 1 to 10. Article 2, concerning definitions, was quite different from the previous text. With its 14 definitions, it seemed somewhat lengthy, and some members believed that definitions should be made on a temporary basis because the topic related to a new area where many terms still awaited definition. His delegation believed that the definitions should be retained pending further study. Article 10 had also undergone a major change and had become a provision on "non-discrimination", which his delegation approved. It was important from the point of view of the right of the victim of transboundary harm to institute civil liability proceedings in the State of origin. Since national legislation varied greatly, and the State of origin was the first to be affected by the accident, that provision specified that the applicable law should be that of the State of origin. Consequently, draft article 30, on "application of municipal law" (footnote 321) should be reconsidered.

57. In reading chapter III of the draft on prevention - draft articles 11 through 20 - he was pleased that the rules of procedure proposed were simpler and more flexible. The obligation of prevention should be based on the obligation of co-operation. As long as no transboundary harm had occurred, noncompliance with the obligation of prevention should not give another potentially affected State the right to begin action. That concept had been explicitly incorporated by the Special Rapporteur in the text of article 18 (footnote 314), which stipulated that the State of origin could not invoke article 23 on "reduction of compensation payable by the State of origin" in the case of harm resulting from a violation of

/...

(*Mr. Liao Jincheng, China*)

the obligation of prevention. It was a reasonable provision which could induce the State of origin to take seriously the obligation of prevention.

58. Like many members of the Commission, he also felt that participation by international organizations would be positive and useful. The review of potential transboundary harm sometimes required highly advanced technology and equipment, which some countries might lack. International organizations should also play a positive role in promoting co-operation among States. The drafts of articles 11 and 12 (footnote 309) were thus acceptable on the whole, though not adequate. Finally, the principle of "balance of interests" embodied in article 17 (footnote 312) was of crucial importance both from the point of view of prevention and of liability.

59. Chapter IV of the draft, concerning liability (paras. 508 and following), was truly the core of the topic and called for some comment. First, article 21 proposed by the Special Rapporteur (footnote 315) imposed the obligation to negotiate compensation in case of harm, an approach that would be more easily accepted by the international community. It was questionable whether existing international law provided for the obligation for reparation in the absence of a violation of international law. The second comment concerned the determination of liability. To say that the operator should bear primary responsibility would be in agreement with current State practice. As pointed out in paragraph 509 of the report, only the Convention on International Liability for Damage Caused by Space Objects attributed liability to the State, and that Convention was of a special nature which could not be generalized. The Special Rapporteur also said that a State should be held liable only to the extent that it had not adopted proper domestic legislation. States could also bear a residual liability. That approach would accommodate situations where required reparation exceeded compensation to be paid by the operator, and as well as the principle that innocent victims should not suffer loss.

60. His delegation supported in principle the articles dealing with civil liability, in chapter V of the draft (paras. 520 *et seq.*). Article 31 (footnote 321) should be reconsidered with regard to the question of jurisdictional immunities of States and their property. His delegation would await the results of further deliberations on that chapter at the next session of the International Law Commission before making further comments.

61. His delegation had already commented on the concept of "global commons" and on the desirability of extending the topic to include it. The Commission should not ignore the problem of the human environment, nor the new concept of "global commons", which covered quite different problems from those in the draft articles, firstly, because of the uncertainty of its definition and legal consequences, and, secondly, because of problems in identifying countries affected by activities considering the multiplicity of States of origin, and the determination of rights and obligation of States of origin and other States. The question should, therefore, be studied in more detail and approached with caution. So much remained to be done by the International Law Commission that there was no foreseeing when it

/...

(Mr. Liao Jincheng, China)

would complete the first reading, and it would be inappropriate to complicate the subject further. Perhaps "global commons" could be made a separate topic in a future programme of work.

62. Sir Arthur WATTS (United Kingdom) addressed, firstly, the question of State responsibility (chap. V of the report). It was an important subject, and the Commission must be encouraged to advance its work, since it had begun its study of the topic 35 years earlier, and it had been 15 years since it had adopted the general plan.

63. The Special Rapporteur had proposed three new draft articles, which had been referred to the Drafting Committee. Regarding the first, article 8, concerning "Reparation by equivalent" (footnote 247), the Special Rapporteur had indicated appropriately that restitution in kind was the primary mode of reparation and that it should be applied whenever possible, while also recognizing a need for reparation by pecuniary compensation where reparation in kind could not ensure complete reparation. In general, article 8 was welcome.

64. With regard to draft article 9 proposed by the Special Rapporteur, concerning interest (footnote 262), his delegation thought that interest should be paid only in cases involving loss of property. That view was supported by the awards of international claims commissions. Secondly, it supported the general agreement in the Commission that paragraph 2 of that article, relating to compound interest, should be deleted, since such interest had been awarded only in the rarest of cases.

65. Draft article 10, entitled "Satisfaction and guarantees of non-repetition" (footnote 263), was important both in principle and in practice, as recent cases had shown. But, as the Special Rapporteur had himself said in paragraph 401, the question of "moral and legal injury" should be considered with great care.

66. His delegation sincerely hoped for real and rapid progress in that important area of the Commission's work. It had noted with interest the Commission's debate concerning the material cited by the Special Rapporteur. It agreed with those who had said that it was important to examine rigorously past State and judicial or arbitral practice, of which there was plenty. When the Commission was engaged in codification, such examination was essential; when there were elements representing progressive development of the law, analysis of States' past behaviour and its consequences was essential to formulating rules for the future.*

67. In the related area of international liability for injurious consequences arising out of acts not prohibited by international law, he noted that the Commission did not have many examples of State practice or of judicial and arbitral

---

* The United Kingdom delegation distributed a document at the meeting containing its detailed comments on draft article 8.

(Sir Arthur Watts, United Kingdom)

awards on which to base its work. It was therefore engaged to a much greater extent in progressive development of the law than in codification. For that reason, he wished to recall two general comments which his delegation had made at the previous session. Firstly, the articles should focus on the practical problems which caused the most difficulty, rather than seeking to deal comprehensively with all aspects of the subject. The proposal for an annex provided a welcome opportunity to ensure with some degree of certainty that the articles related to those activities identified as causing the most problems. Secondly, caution must be exercised before attributing far-reaching consequences to lawful acts, since the articles dealt with acts not prohibited by international law. The new article 17 (footnote 312) recognized that the duty to compensate and to negotiate reparation should be tempered by practical considerations. That new provision was most welcome.

68. Article 17 was important for other reasons as well. As a matter of substance, it set forth factors which could be taken into account during negotiations in order to achieve an equitable balance of interests; in other words, it indicated the practical matters which the States concerned were to take into account when negotiating reparation for transboundary harm. It also illustrated an interesting procedural point. At the previous session, delegations had commented on draft article 9 without the benefit of the text that now appeared in article 17. With the new provision, article 9 appeared in a completely different light. It also seemed more acceptable because its significance was clearer. That showed that examining articles piecemeal was not the most useful way of proceeding, since any one article might be significantly affected by articles that appeared subsequently.

69. On the subject of the Committee's working methods, he commended the considerable efforts which the Commission and its successive Special Rapporteurs had devoted since 1978 to developing a schematic outline and producing draft articles on the topic. That praise was all the more deserved because the topic largely involved progressive development of the law and there was no established and extensive body of State practice and case-law on which to build. The Commission had therefore developed the topic in directions which had been scarcely imaginable in 1978, increasing its scope so much that completion of work on the topic seemed a distant prospect. The Sixth Committee should take a fresh look at the topic, not article by article but in broad terms, to see whether it agreed with the direction the Commission's work was taking. The Committee might also consider assigning priority to some aspects of the topic, bearing in mind the current needs of the international community. To that end, the Commission should present the Sixth Committee with an overall review of the status of its work on the topic and an indication of the direction it intended to take in the future. There was no need to wait to implement that proposal until the Commission reached a natural break in its work on the topic, which might not be for several years. A report presented as soon as possible would allow the Sixth Committee to take a decision, perhaps as early as the next session of the General Assembly, on the future direction of work on international liability for injurious consequences arising out of acts not prohibited by international law.

/...

70. Mr. VOICU (Romania) presented his comments on the report of the International Law Commission chapter by chapter and specified that they were of a preliminary nature, since the proposed draft articles required more extensive reflection and analysis. With regard to the first two chapters, he noted that the Commission had devoted the greatest number of meetings (16) to the topic "Draft Code of Crimes against the Peace and Security of Mankind". Since that topic was dealt with under a separate item on the General Assembly's agenda, his delegation would discuss it when that agenda item was considered.

71. At the previous session, his delegation had made a number of observations on the draft articles relating to jurisdictional immunities of States and their property (chap. III); it was pleased to note that the Commission had taken those observations into account. In accordance with Romania's proposal, the Commission had decided to replace the expression "limitations on" or "exceptions to" with a more neutral formulation: "Activities of States in respect of which States agree not to invoke immunity".

72. Chapter IV on the law of the non-navigational uses of international watercourses illustrated the usefulness of the Special Rapporteur's analyses. He noted that there was no definition of the term "regulation" in article 25. The definition adopted by the International Law Association in 1980 seemed satisfactory and should be taken into consideration. With regard to article 26 on joint institutional management (para. 275), the best approach would be to draft recommendations on which States could base their own definitions of the responsibilities and powers of the organ they decided to establish. From that standpoint, he questioned the appropriateness of dealing with problems related to armed conflicts by means of a framework agreement. Such an approach could impinge on the law relating to armed conflicts or on other studies being conducted by the Commission itself, such as that on crimes against the peace and security of mankind. Lastly, annex I on the implementation of the draft articles could be the starting point for an optional protocol.

73. Chapter V of the report showed that the Special Rapporteur on the question of State responsibility had successfully dealt with the main aspects of his subject: the substantive consequences arising from an internationally wrongful act other than cessation and naturalis restitutio, and reparation by equivalent, satisfaction and guarantees of non-repetition. He had also dealt with the question of the impact of fault, in a broad sense, on the forms and degrees of reparation. That was a very complex issue, and the Special Rapporteur had had to cite a large number of old arbitral awards rather than relying on more recent data. However, he had established a certain balance in his research by recognizing the importance of diplomatic practice. It was through such practice, in fact, that general international law was developed. Analysis of it was therefore relevant, especially in view of the scarcity of international case-law on the subject.

74. With regard to draft article 8 proposed by the Special Rapporteur (footnote 247), on "Reparation by equivalent", further consideration should be given to the title in order to avoid any ambiguity. The concept of reparation by equivalent was founded on a well-known and relatively clear principle. Moreover, the Permanent Court of International Justice had provided an excellent point of

/...

(Mr. Voicu, Romania)

departure. The terminology used in paragraph 2 of the article should be refined; for example, the expression "economically assessable damage" was a self-evident description, for it meant that in order to be compensated, damage had to be assessable in economic terms. In the same paragraph, it would be preferable to retain the expression "moral damage" because the proposed alternative expression, "immaterial damage", could give rise to interpretations that diverged widely from the meaning normally attributed to that expression.

75. Article 9 on "Interest" (footnote 262) had a technical aspect but benefited from a flexible formulation, as could be seen from the second paragraph proposed in the report. It seemed logical and normal that compound interest should be awarded whenever necessary in order to ensure full compensation, and that the interest rate should be the most suitable to achieve that result. However, as members of the Commission had said, it was preferable not to go into detail. Lastly, the decision on the placement of the article should be taken when the entire set of draft articles was complete.

76. Article 10 on "Satisfaction and guarantees of non-repetition" (footnote 263) dealt with a very delicate issue. In practice, the injured State often had difficulty in obtaining full and complete satisfaction. The distinction between moral injury and legal injury must be examined with the utmost care because its importance was practical as well as theoretical, particularly in cases involving rules of international law on the protection of human rights and of the environment. The language of paragraph 4 of the article should be refined, but should continue to express the idea that the forms of satisfaction should not be humiliating to States or inconsistent with their sovereign equality.

77. The impact of fault on the forms and degrees of reparation (paras. 408-412) was a question which deserved more extensive discussion. The attribution of fault to a State was highly complex, and practice varied considerably. According to some members of the Commission, fault by State agents should not be imputed indiscriminately to the State. That idea, which was mentioned in paragraph 412, should be analysed with care.

78. Chapter VII of the report, on international liability for injurious consequences arising out of acts not prohibited by international law, set out the schematic outline proposed by the Special Rapporteur, which his delegation found entirely acceptable. Mention should be made of the timeliness of, inter alia, article 8 on Prevention (footnote 307), under which States of origin must take appropriate measures to prevent or minimize the risk of transboundary harm. Consultations had an important role to play in that connection and the States concerned were called upon to consult in good faith and in a spirit of co-operation.

79. Consultations did not, however, preclude unilateral preventive measures. Draft article 16 entitled "Unilateral preventive measures", proposed by the Special Rapporteur (footnote 310), was thus wholly relevant. Mention should be made of the practical value of a proposal which required the State of origin to counteract the effects of an incident that had already occurred and that presented an imminent and grave risk of causing transboundary harm.

/...

(Mr. Voicu, Romania)

80. The question of determining whether the future convention would apply to harm caused in the territory of a single State or in the territory of several States was not of the essence. If such harm affected several States, there must obviously be rules which would apply to that *de facto* situation. However, if the activity of a State caused harm to the "global commons", the situation went beyond the scope of the draft in preparation. There were other aspects of those "global commons" which would have to be regulated in a different way from territories which fell within the sovereignty of a State. Lastly, the future convention would have to incorporate the direct liability of transnational corporations which operated in the territory of other States and whose activities caused transboundary harm.

81. Mr. LOULICHKI (Morocco) said that, in considering the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law as a whole, one could not fail to note the great flexibility, and sometimes uncertainty, which was a feature of some of the draft articles and which derived either from a perceived divergence in State practice or from the absence of a stable practice reflecting a customary norm. His delegation therefore fully understood the caution with which the Special Rapporteur was approaching a topic that primarily involved the progressive development of international law and related to situations each of which had its own specific features.

82. Responding to the questions raised by the Commission in paragraph 531 of the report, his delegation said that it agreed with the Special Rapporteur that there could be no major difference, from the standpoint of the legal régime, between activities involving risk and activities with harmful effects. At the same time, it could not agree with the view that the scope of the articles should be specified in the form of a list of harmful activities or substances. A general definition would seem more in line with the Commission's aim of arriving at a framework convention with universal scope.

83. With regard to draft article 10 (footnote 308), which dealt with non-discrimination between the effects of activities that arose in the territory of one State and those arising in the State of origin, the provision, which would guarantee domestic remedies to foreigners on the same footing as to nationals, would be applicable in the case of similar or comparable legal systems but could not be imposed in the form of a convention on States parties with differing legal systems. On the other hand, such States could include a provision to that effect in bilateral agreements.

84. Article 17 (footnote 312) should be brought into line with article 9 (footnote 307): the latter article established the principle that reparation should seek to restore the balance of interests affected by the harm, while the former listed the factors to be taken into account in achieving a balance of interests. His delegation agreed with the Special Rapporteur's comment in paragraph 500 that the factors listed in article 17 "were not truly legal norms and hence they might be inappropriate for inclusion in these draft articles". It did, however, recognize that the reference to a balance of interests was relevant in the

/...

(Mr. Loulichki, Morocco)

context of chapter III of the draft articles, which dealt with the obligation of prevention and its consequences. In that regard, draft article 20 (footnote 314) provided for the prohibition of an activity if transboundary harm could not be avoided or could not be adequately compensated.

85. In view of the importance of prevention in the draft articles, the Commission should eliminate from the wording of the obligations arising under chapter III terms which would weaken its scope, such as "in an attempt to establish a régime" (art. 14), "encouraging the adoption of compulsory insurance" (art. 16) or "should withhold authorization" (art. 17). In his delegation's opinion, failure by a State to comply with its obligations should also have more deterrent consequences than the mere prohibition of an injurious activity.

86. Chapter IV of the draft articles concerned compensation for harm and the liability attributable to the state of origin or the operator. In that respect, draft article 21 (footnote 315) established the obligation of the State of origin to negotiate with the State affected by an injurious transboundary activity "bearing in mind that the harm must, in principle, be fully compensated". His delegation would prefer the article to establish, in an opening paragraph, the principle of compensation and to indicate, in a second paragraph, the circumstances which would justify limited reparation. With regard to the choice of the party to be held liable for the transboundary harm, if the Commission decided to retain the liability of the operator, it would have to establish a link between the operator and the State of origin and stipulate a residual liability on the part of the latter, the main aim being to ensure the best possible reparation for the harm. The Special Rapporteur had proposed two alternatives for draft article 25 (footnote 316) concerning cases in which there was a plurality of States of origin. The second alternative, which envisaged a shared liability between the States of origin in proportion to the harm which each one of them had caused, was more realistic and seemed to have a better chance of acceptance by States parties. The Special Rapporteur had therefore been right to recommend its retention.

87. Draft article 24 provided for the submission, through the diplomatic channel, of claims for reparation. Such a procedure relied on the prior exhaustion of domestic remedies, a condition which the Commission should take into account in the draft as a whole.

88. Finally, his delegation doubted the usefulness of draft articles 26 and 29, but thought it appropriate to include in the draft some general considerations regarding the legal régime applicable to areas beyond national jurisdiction of States (para. 526). It hoped that, at its next session, the Commission would direct its endeavours towards firmly establishing the main concepts on which that aspect of liability should be based.

89. Mrs. OBI-NNADOZIE (Nigeria) said that draft articles 8 (Reparation by equivalent), 9 (Interest) and 10 (Satisfaction and guarantees of non-repetition), as proposed by the Special Rapporteur on State responsibility, were of particular interest to her delegation.

/...

(Mrs. Obi-Nnadozie, Nigeria)

90. With regard to draft article 8 (footnote 247), her delegation agreed that the dictum of the Permanent Court of International Justice in the Chorzów Factory case, namely, that reparation was to wipe out all the legal and material consequences of the wrongful act, should serve as the starting point for formulating the provisions on reparation by equivalent. It was only logical that monetary or pecuniary compensatory measures should be adopted in the application of that dictum both to injured nationals and States.

91. Her delegation hoped that further studies on paragraph 2 of that draft article would clarify the criterion of "economically assessable damage" and would avoid controversial interpretations. It also believed that the economic assessability of damage should be based on the degree of damage rather on the financial status of the offending State. It agreed with the general principle in paragraph 3, provided that the loss of profits was real and could be assessed. Lastly, the uninterrupted causal link mentioned in paragraph 4 remained an important and valid criterion, although it might lead to unlimited liability for a State.

92. Draft article 9 (footnote 262) posed a problem for her delegation. While noting the reasons adduced by some members of the Commission for its total deletion, her delegation felt that it was still necessary to provide for interest to be paid on the amount awarded as principal, as that might prompt the State which had committed an internationally wrongful act to accelerate payment of the principal.

93. On draft article 10 (footnote 263), entitled "Satisfaction and guarantees of non-repetition", her delegation agreed with the Special Rapporteur that satisfaction was characterized by its retributive or punitive nature (para. 390). However, it was not a punitive measure. The reference to "moral or legal injury" needed clarification, since the dignity, honour and prestige of the State were part of its sovereign rights.

94. Turning to chapter VII of the report, on international liability for injurious consequences arising out of acts not prohibited by international law, she welcomed with satisfaction the provisions of chapter III of the draft, on prevention, which called for assistance by international organizations to developing countries. It was also important to stress that the welfare of other sovereign States should be a legitimate concern of all States. Therefore, in a situation where the assessment of a proposed activity showed that transboundary harm could not be avoided or could not be adequately compensated, authorization for such dangerous activity should be refused. The activity should even be banned unless the necessary preventive measures were taken. If transboundary harm still occurred, the State of origin should be held liable and should be required to indemnify the injured State. It was the responsibility of States to ensure, through the mechanisms at their disposal, that the activities conducted in their territory did not cause harm to other States. Compensation and reparation should always be commensurate with the harm caused. However, the fact that injuries often took a long time to manifest themselves underscored the need for the criterion of a causal link between the wrongful act and the injury.

/...

(Mrs. Obi-Nnadozie, Nigeria)

95. Although the idea of a list of dangerous substances had its merits, such a list could never be exhaustive and therefore would create loopholes for bad and harmful conduct.

96. Lastly, her delegation looked forward to the outcome of future work on harm to areas beyond national jurisdiction (para. 526), which were particularly important with respect to the environment, and believed that the Commission should place more emphasis on that aspect at its next session.

97. Mr. VUKAS (Yugoslavia) said that although the three new draft articles prepared by the Special Rapporteur on State responsibility stated the general principles of applicable law on the subject, a general question remained to be answered: namely, to what extent such general principles could satisfy the problems of State responsibility in various fields of contemporary international law (including the use of nuclear energy, economic relations between States, the global environment, human rights and the rules of warfare). The future development of the law on State responsibility probably would lead to the establishment of specific rules in specific fields of international law, and the general principles stated in the draft would serve as residual rules.

98. Draft article 8 (footnote 247) was generally acceptable to his delegation, for it correctly reflected the existing law. In respect of paragraph 1, his delegation preferred alternative (a), which was simple and clear in legal terms. It would also prefer to see the reference to "any moral damage sustained by the injured State's nationals" transferred from article 8, paragraph 2, dealing with pecuniary compensation, to article 10, dealing with "satisfaction". The paragraph should have included a provision on the material damage sustained by the injured State's nationals.

99. It was true that besides damnun emergens, compensation under article 8 should also include lucrum cessans. Paragraph 4 of the article stated that only the existence of an "uninterrupted causal link" between the internationally wrongful act and the damage justified pecuniary compensation. However, there were situations in which States should be held responsible for damages although there had been an interruption between the beginning of the harmful activity and the wrongful act. Like draft article 7, regarding restitution in kind, draft article 8 should contain limitations, particularly if damage had not been caused by wilful intent.

100. In the opinion of his delegation, there was no need for a separate draft article 9 (footnote 262). The problem of interest should be considered within the general framework of lucrum cessans, dealt with in article 8, paragraph 3.

101. In general, his delegation had no problems with draft article 10 (footnote 263), but felt that the notion of "legal injury" in paragraph 1 should be studied more thoroughly. In respect of paragraph 2, it noted a discrepancy between the title and the content of the draft article: "guarantees of non-repetition" were mentioned in the title separately from satisfaction, while in the body of the

paragraph they figured as one of the forms of satisfaction. He was therefore pleased that the Special Rapporteur was prepared to consider a separate article for guarantees of non-repetition.

102. Turning to chapter VII of the report under consideration, on international liability for injurious consequences arising out of acts not prohibited by international law, he said, firstly, that in the title of the article the expression "international liability" should be replaced by "State liability", since draft article 9 (footnote 307) provided that "the State of origin [should] make reparation for appreciable harm caused by an activity carried out in its territory or in other places under its jurisdiction". Whatever the eventual decision of the Commission concerning the liability of the operator, at least residual liability should remain with the State of origin. The close link between that topic and the question of State responsibility had been pointed out by the Commission during its discussion of liability for harm to areas beyond national jurisdiction.

103. As other delegations had pointed out, the inclusion of a list of dangerous substances in article 2 would hardly help to clarify the scope of the draft articles, since the list could not be exhaustive. Such a list could, however, be annexed in the form of guidelines. The same applied to the long list of factors, now appearing in draft article 17 (footnote 312), to be taken into account to achieve an equitable balance of interests among the States concerned.

104. In addition to the changes already made in the definition of "transboundary harm" in draft article 2 (g) (footnote 305), his delegation believed that the scope of the notion should be broadened to include not only territories under the jurisdiction or control of another State, but also areas beyond national jurisdiction, such as the high seas, the sea-bed, Antarctica and outer space. Naturally, such a change in the definition of "transboundary harm" would also require a consequential change in other parts of the draft. Although his delegation recognized that it would not be easy to adapt the present draft articles by including the so-called "global commons", it did not think that their protection should be restricted to State responsibility for lawful acts.

105. Mr. YEPEZ (Venezuela), recalling the second report of the Special Rapporteur on the question of State responsibility, pointed out, with respect to the distinction drawn between "material" and "moral" damage, that damage to a State or individuals resulting from an internationally wrongful act could be of both types. Generally speaking, material damage was easy to define, as were its consequences. "Moral" damage, however, did not entail a patrimonial loss, and was analysed in terms of suffering or the moral injury to the victim whose rights were affected as well as to his honour, prestige or dignity, which were intangible notions that must be defined to some extent, even if it was difficult to measure them in monetary terms and compensate them by means of pecuniary reparation or satisfaction. His delegation favoured maintaining the notion of moral damage in domestic law and in international practice.

106. The objective of the principle of "reparation by equivalent", generally accepted in the doctrine, was to restore for the injured party the situation which

/...

(Mr. Yepez, Venezuela)

would have existed if the harmful act had not occurred. It therefore implied that the reparation should be identical or equal to the damage, namely, neither less than or more than such damage. Although in international practice the criterion was not applied in all cases, consideration of the subject required taking all possibilities into consideration and seeking solutions that were generally acceptable both in cases where there was a contractual responsibility and in cases where there was no contractual responsibility. Furthermore, the draft articles should not have the effect of restricting the autonomy of the parties. It might therefore be useful to insert a provision which expressly stated that specific types of compensation represented acknowledgement of responsibility for, and reparation of, the damage.

107. With regard to draft article 8, entitled "Reparation by equivalent" (footnote 247), he said that his delegation preferred the text proposed for paragraph 1 in alternative (a) which, although identical to alternative (b) as far as the substance was concerned, was better phrased from the standpoint of form, although it could still be improved. Paragraph 1 should contain the following interdependent elements: the right of the injured State to claim from the State which had committed the wrongful act pecuniary compensation, the obligation of the latter State to make restitution for damage by paying compensation, and the fact that the purpose of pecuniary compensation was to make good any damage not covered by restitution in kind. If all those elements were combined in a suitable manner, the paragraph would be acceptable.

108. With regard to the inclusion in the draft of a specific provision concerning interest (art. 9, footnote 262), he said that his delegation felt a priori that such a provision would serve no useful purpose and could give rise to controversy. Indeed, State practice with regard to interest rates, dies a quo, compound interest and terms differed from one country to another, and might be irreconcilable. It would be more logical, in order to take interest into account in calculating compensation, to establish in the draft articles the obligation to pay interest so as to ensure full reparations for the damage, and draw up a general provision whereby the details would be left up to the courts. Such a provision could be included in article 8 or elsewhere.

109. Draft article 10, concerning satisfaction and guarantees of non-repetition (footnote 263), was acceptable, although it could be improved in the light of the views expressed during the debate in the International Law Commission and the Sixth Committee. In paragraph 1, the reference to "legal injury" should be deleted, since that concept was implicit in any wrongful act. It would be sufficient, therefore, to speak of "moral injury" resulting from any injury to the State's dignity, honour or prestige.

110. As far as the forms of satisfaction were concerned, it would be better to draw up a general provision without going so far as to establish the form such satisfaction should take; perhaps one might stress the idea of "guarantees of non-repetition of the wrongful act", in reference to the wrongful act which gave rise to the injury, whether it was of a pecuniary nature or not.

(Mr. Yepez, Venezuela)

111. With regard to the question of the impact of fault on the forms and degrees of reparation, he said that his delegation was inclined to hold the view, widely accepted in practice, that fault played a significant role in determining the consequences of a wrongful act, which must be left to the determination of appropriate decision-makers such as international arbitral tribunals and courts.

112. Turning to the question of international liability for injurious consequences arising out of acts not prohibited by international law, he said that he agreed with the Special Rapporteur that activities involving risk and activities with harmful effects had more features in common than distinguishing features, and that it should therefore be possible to examine their consequences in a similar manner under a single régime. He also agreed with the Special Rapporteur's idea of proposing the establishment of a single régime for both types of activities in which there was a need for notification, information and consultation between the States concerned. That did not mean, however, that the definition of activities with harmful effects might not include those activities which caused damage, when the risk of damage had not been foreseen.

113. With regard to the scope of the draft, he said that his delegation agreed with the Special Rapporteur that it might be advisable to follow the approach taken by the Committee of Experts for the European Committee on Legal Co-operation of the Council of Europe, i.e., to define intrinsically dangerous activities in relation to the concept of dangerous substances, a list of which had been annexed to the rules, and what was done with such substances, namely, handling, storage, production, unloading and similar operations. The list could be as long as possible without being exhaustive. As envisaged in the draft articles, dangerous substances could be defined as those which created a significant risk of harm to persons or property or the environment. Such a system would have the advantage, on the one hand, of providing the necessary flexibility to avoid unduly restricting the scope of the draft and, on the other hand, of allowing for considerable precision.

114. In the view of his delegation, articles 1 and 2 of the draft were acceptable as they stood, but the wording of article 2 (a), which referred to "activities involving risk", should be re-examined in order to include other activities in the definition; in subparagraph (f), the concept of "activities with harmful effects" should be more clearly defined. Subparagraph (h), which referred to "[Appreciable] [Significant] harm" should be developed and clarified, since it posed a number of conceptual difficulties when it came to a comparison with negligible harm, which was normally tolerated, and which had not been defined either. With regard to articles 3, 4 and 5, his delegation agreed that the title of article 3 should be refined, and that article 4 should be brought into line with the Vienna Convention on the Law of Treaties. Article 5 could also be improved.

115. His delegation shared the view that flexible procedural rules should be envisaged to secure preventive measures. It therefore agreed with the wording of articles 11 and 12, although it wished to point out that that should not preclude further examination of the role of international organizations which might participate in preventive activities.

/...

(Mr. Yepez, Venezuela)

116. He doubted whether it was either necessary or advisable to bring in the factors or criteria intended to give content to the concept of balance of interests in article 17, because what was sought was not so much a set of legal norms as of guidelines which States might or might not wish to take into account in their consultations or negotiations. Finally, his delegation was in favour of maintaining articles 18, 19 and 20. Article 18 reconciled the fact that failure to comply with the obligations of prevention, particularly in the matter of procedure, should not constitute grounds for a potentially affected State to institute proceedings and the fact that failure to comply with those obligations should entail certain consequences, in particular, that of preventing the State of origin from invoking the provisions of draft article 23 in its favour.

117. Referring to paragraph 531 of the Commission's report, in which it requested the views of Governments, he said that his delegation took the position that any transboundary harm gave rise to liability, regardless of any preventive measures that might have been taken by the State of origin. Hence, the draft articles should expressly state that any transboundary harm entailed the obligation to pay compensation, instead of merely establishing the obligation to negotiate such compensation.

118. Finally, on the question of determining which party was liable, i.e., the question of establishing whether the State of origin or the operator should be held liable, his delegation favoured the view that, without prejudice to the liability of operators, owners, carriers and others, the primary liability should fall on the State of origin because, in the final analysis, the State of origin exercised control over the activities carried out in its territory, and it was responsible for ensuring that such activities did not cause injury to others. Consequently, article 21 should clearly establish the obligation to pay compensation, and the idea that it must be full compensation. Another provision might also be included to establish under what circumstances compensation might be reduced.

The meeting rose at 6.25 p.m.